The

ARBITRATION JOURNAL

UARTERLY OF THE AMERICAN ARBITRATION ASSOCIATION
Volume 14, No. 3 1959

THE ARBITRATION JOURNAL

VOLUME 14 1959 NUMBER 3

The Arbitration Journal is published quarterly by the American Arbitration Association, Inc.: Nicholas Kelley, President; Sylvan Gotshal, Chairman of the Board; Paul M. Herzog, Executive Vice President; A. Hatvany, Secretary-Assistant Treasurer. Annual subscription: $4 in the United States; $4.50 elsewhere in the Western Hemisphere; $5 foreign; single copies $1.50.

AN EDITORIAL

Observations on Labor Arbitration Costs

SIX months ago, there appeared in the *I.U.D. Digest,* the quarterly publication of the AFL-CIO's Industrial Union Department, an article entitled "Our Avaricious Arbitrators." It cited a number of cases in which labor-management arbitrators charged excessive fees for their services and delayed their awards unconscionably. The article was unsigned and the author did not disclose the names of the arbitrators whom he accused. Nevertheless, the article received wide attention. Salient portions appeared in other labor publications, columnists on daily newspapers commented on it, and the article became the occasion of an article on labor arbitration costs in *Fortune* magazine.

The tone and approach of the anonymous article was regrettable, for it distracted from a more constructive search for a solution to the cost problem. As we have said in an editorial in *Arbitration Journal,* Number 1, 1959, the real problem is not that of the occasional arbitrators who inflate their bills and who thereby soon "render themselves unacceptable to parties," but rather that of the "cost of service rendered by the overwhelming majority, the honest and conscientious arbitrators whose integrity has never been questioned." Thus, while the problem of the unethical individual solves itself, the danger remains that rising costs may cause arbitration as such to be "priced out of the market."

The *I.U.D. Digest* article had left many thoughtful persons in the labor-relations community with a feeling that the profession had been dealt with unfairly, and some answers have already appeared in print. Perhaps the most effective answer was one appearing in the current issue of the very same publication. This time, the author signed his name. He is Arthur J. Goldberg, General Counsel of the Industrial Union Department, AFL-CIO, and a member of the American Arbitration Association's Executive Committee. "Just as it is wrong to distort the impression of the labor movement by implying that its sinners are typical," Mr. Goldberg wrote, "so is it a disservice to permit an impression that arbitrators generally are guilty of the list of 'crimes' depicted in the *I.U.D. Digest* article." Mr.

Goldberg continues his discussion on so rational a plane that we believe no better contribution can be made to an understanding of the cost problem in arbitration than to reprint the following excerpts from his article:

"Competent arbitration is not easy to achieve. Naturally it requires an able man as the arbitrator, one who can grasp a wide variety of problems, understand facts often peculiar to a particular industry or plant or operation and exercise fairness, independence, and courage. Often management is absolutely convinced it is right and cannot conceive how an impartial person can conclude otherwise. Perhaps even more often union members involved in a dispute believe beyond doubt that they are right beyond honest, fair question.

"Yet the arbitrator must be prepared to decide against one party or the other. Inevitably great displeasure results from some decision. To protect the independence of the arbitrator, we should avoid undercutting the reputation and prestige of those who do a good job. The independence and courage of the arbitrator are important to us because the most important disputes that must be decided are usually

AMONG OUR CONTRIBUTORS

WAYNE E. HOWARD is Assistant Professor of Industry at the Wharton School of Finance and Commerce, University of Pennsylvania. He is known to readers of *The Arbitration Journal* through several articles on seniority and ability problems in industrial relations.

PHANOR J. EDER, a member of the New York Bar, is Adjunct Professor of Comparative Law at New York University's Law School. He is author of many books and articles, including *A Comparative Study of Anglo-American and Latin-American Law,* published by New York University Press.

the ones about which management feels most strongly. An arbitrator who curries favor instead of meting out justice as he honestly sees it will not stand up when the big test issues do arise.

Responsibility of Parties

"The adequacy of the arbitration process is not determined by the arbitrator alone. The parties share a major responsibility. If a company seeks to undermine the process and goes about doing this cleverly, the arbitrator cannot defeat such efforts. He might try and can be helpful, but ultimately the union involved has the major responsibility for bringing the company to terms. If the union is helpless to do so, then we have a truly troublesome problem, but it is hardly fair or helpful to blame arbitrators for our own unresolved difficulties with a company that resists a mature, wholesome collective bargaining relationship.

"In all honesty I must also note that a union can also block the effectiveness of the arbitration process. If the union's representatives do not present the facts and arguments adequately, the arbitrator has a difficult time determining the case fairly. Both parties have a major responsibility to the arbitrator: they hire him; he is not imposed on them. He is entitled to help from the parties so that he can reach a fair conclusion. He has no source of information or of understanding of the context in which to view contract clauses except the parties themselves.

"The problems of costs and of delay do exist. These problems are not created primarily by arbitrators; where they exist, it is because of trends in the labor-management relationship itself.

Effect of "Overloaded" Arbitrators

"A growing volume of arbitration and of more use of the process has led to overloaded arbitrators. Parties want a relatively select group of men, widely known and with extensive experience. These men feel an obligation to resolve problems for parties with whom they have worked and many times their refusals are met with pleas—'Can't you squeeze it in?'

"Naturally this concentration of cases among the so-called 'top men' in the field invites delay—delay in getting a hearing date acceptable to many people (counsel for each side, officials of each side, and the arbitrator). And then the arbitrator has to find time some-

how to study the case and write a decision which is fair, clear, simple, and convincing. Everyone knows it is harder to be clear and brief and simple and convincing than merely to record impressions and opinions as they first come out.

"Delay is bad. It threatens the value of the whole process. Yet, there are many times when an arbitrator is blamed for a delay of several weeks or months when the parties themselves have piled up their own delays two and three times or more than the arbitrator's actual time in arriving at his decision. There are delays in the grievance procedure, delays in selecting an arbitrator, delays in preparation, delays in filing briefs or data. It is often convenient to blame all these delays on the arbitrator when in fact one or the other party or both have been to blame.

Remedies Available to Parties

"If parties do not want delay from the arbitrator, they can make their desires known beforehand. If the arbitrator is not able to meet the proposed schedule, then another man can be selected. If an arbitrator does agree to meet certain time limits and fails to deliver, then the parties need not use him again if that is their desire. After all, the parties initially decide who is to be appointed—and no one but the parties.

"Then there is the matter of fees. Some arbitrators have higher fees than others. The parties are free to decide what they are willing to pay. A union need not agree to a man whose fee is higher than they are willing to pay. And if an arbitrator's bill is too high in a union's opinion—be it because of alleged padding or any other reason —the union is free to refrain from using that person again. Most arbitrators, in fact the overwhelming majority, are honest and most scrupulous in their financial arrangements.

"If a man charges an improper fee (as distinct from one based on a rate higher than you care to pay), then there are ample means to bring the matter to light. Between the National Academy of Arbitrators (a professional group), the American Arbitration Association, and the Federal Mediation Service, arbitrators guilty of improper practices would soon be former arbitrators for all practical purposes."

THE INTERPRETATION OF ABILITY BY LABOR-MANAGEMENT ARBITRATORS

by Wayne E. Howard

Where seniority is qualified by skill and ability, a fundamental problem in interpreting the seniority rights of employees under collective bargaining agreements results from a confusion in the minds of negotiators as to what they mean by the term "ability." Like many basic words in our vocabulary, everyone understands what he intended until he is called upon to define the term with some degree of precision; whereupon it is discovered that not only is he less sure of what he meant by the term, but semantic difficulties have resulted in a complete breakdown of communication with others who have interpreted the term in a different manner. Nor can this question be adequately solved through arbitration. Not only is the arbitrator uncertain of what the parties really agreed upon, if indeed they did agree, but unfortunately he may interpret such a common term in a way quite different from that of either of the negotiating parties. One arbitrator commented on this problem as follows:

> Ability to perform the job with what degree of skill? Here disagreement begins. Someplace around the minimum standard of performance on the job the Union might incline to say: "At this point he demonstrates his ability to perform the work," and someplace around the outstanding performance on the job the Company might incline to say: "At this point he demonstrates his ability to perform the work." The Arbitrator is left in between. This is so because he is asked to say how much weight should be given to "ability" when the parties have not said and when there are no accepted meanings of such types of clauses.[1]

It thus becomes more difficult for negotiators to determine other thorny issues in the application of ability provisions, for where the meaning of the word is not clear, how can the question of the amount of ability which should qualify seniority rights be solved, and, where there is no basic agreement on what is meant by ability, how can the parties agree upon criteria for determining it?

1. Opinion of J. W. Murphy in re Coca Cola Bottling Co. (1952) 18 LA 757.

Ability, Capability, and Competence

The issue of interpreting ability qualifications has been made more complex by the lack of standard practice in the formulation of seniority provisions in contracts. Some contracts qualify seniority in terms of "ability"; others use such terms as "capability," "competence," and "skill and knowledge":

> In case of plant-wide layoff, senior employees shall be retained so far as is practicable and consistent with proper *ability* to perform services required.[2] (italics added)
>
> The principle of seniority, seniors being *competent,* shall prevail.[3] (italics added)
>
> Seniority shall govern all promotions in the bargaining unit where the employee has the qualifications to perform the position in a *capable* manner.[4] (italics added)

Some labor agreements have recognized the issue and defined "ability," "capability," or "competence" in terms of the time necessary for the employee to be able to do the work. One such provision reads:

> For this purpose the longer service employee will be deemed *capable* (italics added) of doing the work of the shorter service employee if the longer service employee does not require more than a 40 hour break-in period.[5]

Where this has been done, there seems to be little difference between the meanings of "ability," "capability," and "competency" in the minds of negotiators, for while the trial periods necessary to establish either of the above terms have varied from eight hours to thirty days, there is no apparent relationship between the length of the trial period and the specific language used in the agreement.

Other agreements have attempted to define ability by description rather than in terms of the time necessary to break-in on the job, but these attempts add little to clarity or definiteness. For instance, one collective bargaining agreement reads:

---

2. Fruehauf Trailer Co. and United Automobile, Aircraft, and Agricultural Implement Workers of America, Local 99 (CIO), 1948.
3. Benjamin Electric Manufacturing Co. and United Electrical, Radio, and Machine Workers of America, Local 1150 (CIO), 1949.
4. International Harvester Co. and United Automobile, Aircraft, and Agricultural Implement Workers of America, Local 1012 (CIO), 1953.
5. International Harvester Co. and United Automobile, Aircraft, and Agricultural Implement Workers of America, Local 305 (CIO), 1953.

INTERPRETATION OF ABILITY BY ARBITRATORS

> Within the meaning of this section, *ability* is defined as an *adeptness* to do the work connected with a designated job in a *proficient* manner—a possession of the *know-how* to perform the duties of a given classification.[6] (italics added)

Such a description of ability adds little to understanding for it merely substitutes the equally misunderstood terms of "adeptness," "proficient," and "know-how." It is doubtful whether the negotiators could precisely define what these terms mean, or whether an outside arbitrator would be able to discover from such a statement any clearer idea of what the negotiators meant than if they had never sought to define the term.

Where the parties have not defined their terms, and there has been no clear past practice to indicate the intent of the negotiators, many arbitrators have distinguished between the terms ability or capability on the one hand, and competence on the other.[7] Competence has been given a stricter meaning than mere ability.[8] Competence has been defined as an employee's ability to perform the job efficiently or proficiently either immediately or after a short break-in period.[9] Some arbitrators relate it to previous experience on the job,[10] and others imply that no training should be necessary before attaining satisfactory performance.[11]

Ability has not only been treated as a less rigid qualification, but arbitrators themselves have not been clear as to exactly what the term implies. On the one hand, it has occasionally been defined as aptitude or the "ability to learn in a normal period of time."[12] On the other hand, it has been defined in terms quite similar to those describing competence.[13] A moderate view between these extremes was expressed by P. N. Lehoczky:

---

6. American Republic Corporation and Oil Workers International Union, Local 592 (CIO), 1951.
7. While there are only a few cases directly on this point, the evidence indicates that arbitrators have not distinguished between ability and capability, and have even used such terms interchangeably in their opinion. See in re Fruehauf Trailer Co. (1948) 11 LA 495; International Harvester Co. (1950) 14 LA 470; Dayton Malleable Iron Co. (1953) 20 LA 572; Singer Manufacturing Co. (1953) 21 LA 500; Fruehauf Trailer Co. (1949) 13 LA 163.
8. In re Lebanon Steel Laundry 4 LA 94.
9. In re Rudiger-Lang Co. (1948) 11 LA 567.
10. In re Benjamin Electric Manufacturing Co. (1949) 13 LA 760.
11. In re Franklin Tanning Co. (1949) 12 LA 410.
12. In re Rudiger-Lang Co. (1948) 11 LA 567; Fruehauf Trailer Co. (1949) 13 LA 163.
13. In re Illinois Malleable Iron Co. (1951) 16 LA 909.

> Ability, however, does not mean the same thing as "native ability". . . In the case at hand, the Company should not be required to teach the employee how to drive a truck, but it should be willing to break him in on the job, if he already possesses the fundamental training needed to perform the job.[14]

While arbitrators have not clearly delineated the degree of expertness required by the terms "ability," "capability," and "competency," they have clearly pointed out the nature of the expertness which is referred to by such terms. In every case studied which bore upon this point, arbitrators have ruled that ability means the present ability of the employee. In each case, they have ruled that the present ability of the employee must be matched against the present job requirements of the job he is seeking to fill.[15] It is not enough that the individual may have potential ability to fill the job at some time in the distant future; the ability must be present at the time of the vacancy.[16] The employee must be able to do all the duties of the job, not merely some of them.[17] On the other hand, the employer may not consider future prospects of the job as one of the elements in determining ability, nor may he take into consideration the fact that the duties of the job may change in the future.[18] Furthermore, excess ability over the amount needed to carry out given job requirements counts for nothing, even in situations where the collective bargaining agreement provides that ability is the controlling factor in job preference.[19]

Types of Ability Clauses

The qualification of seniority by the possession of skill and ability on the part of the worker has been expressed by negotiators in three varying types of seniority provisions: the primary ability provision, the equality of ability provision, and the sufficiency of ability provision.

---

14. In re Seagrave Corp. (1951) 16 LA 410.
15. Opinion of H. M. Gilden in re Standard Forgings Corp. (1950) 15 LA 636; additional cases supporting these general views are: in re Fruehauf Trailer Co. (1948) 11 LA 495; McLouth Steel Corp. (1948) 11 LA 805; Illinois Malleable Iron Co. (1951) 16 LA 909; Quaker Shipyard and Machine Co. (1952) 19 LA 883; Universal Atlas Cement Co. (1951) 17 LA 755; Pittsburgh Steel Co. (1953) 21 LA 565.
16. In re Wagner Electric Corp. (1953) 20 LA 768.
17. In re John Deere Des Moines Works (1954) 22 LA 274.
18. In re North American Cement Corp. (1948) 11 LA 1109; Cameron Iron Works, Inc. (1954) 23 LA 51.
19. In re Pittsburgh Steel Co. (1953) 21 LA 565.

INTERPRETATION OF ABILITY BY ARBITRATORS

a. *Primary Ability Provision*

The distinguishing characteristic of this type of ability provision is that seniority is relegated to a secondary consideration. Only where the ability of the employees competing for a given position is equal, or substantially so, may seniority be considered a factor in determining job preference. While the language or terminology may differ in various agreements, the intent of the parties is to place first consideration upon ability, as shown by the following examples of contract provisions:

> In case of an increase or decrease of forces—the following factors listed below shall be considered; however, only when "a" and "b" are relatively equal shall continuous service be the determining factor.
>
> a. Ability to perform the work
>
> b. Physical fitness
>
> c. Continuous service[20]
>
> In all cases of layoff, rehiring, promotion, and demotion where physical fitness and ability to perform the available work are equal, length of service shall govern.[21]
>
> Seniority shall be the determining factor only if candidates as determined by management have approximately the same qualifications for the job.[22]
>
> In the selection of employees within the bargaining unit for promotions . . . seniority shall govern if other necessary qualifications of the individuals are substantially equal.[23]
>
> In cases of promotion, where ability and skill are relatively equal, primary consideration shall be given to length of service within the department.[24]

Under these provisions, management has full authority to compare the relative abilities of all candidates for job vacancies, and the

---

20. Worth Steel Company and United Steelworkers of America, Local 3182 (CIO), 1949.
21. Stewart-Warner Corporation and United Electrical, Radio, and Machine Workers of America, Local 1154 (CIO), 1948.
22. E. I. DuPont de Nemours and Co. and Film Employees' Association, 1952.
23. Southern Bell Telephone and Telegraph Co. and Communication Workers of America, Southern Division No. 49 (CIO), 1951.
24. Central Screw Co. and United Steelworkers of America, Local 2226 (CIO), 1948. This provision is particularly confusing since it states that "primary" consideration will be given to length of service when in effect seniority only receives secondary consideration since it is only a factor when ability and skill are not relatively equal.

seniority of the candidates need only be considered if their abilities are relatively equal.

Most issues in the application of such contract provisions have centered around what is meant by "equal ability." The problems of precision in measuring ability have encouraged arbitrators to interpret "equal ability" as relatively, approximately, or substantially equal. The degree to which management may differentiate ability depends largely on its own tools of measurement. One arbitrator commented upon the difficulties of measurement, as follows:

> The problem of determining the relative ability of employees is always a difficult one. Precise equality of skill is an abstraction and even if it does exist we lack measurements keen enough to ascertain that fact. The closest of comparisons are, at best, fairly rough approximations. Therefore, the phrase, "where ability, production, and conduct have been equal," . . . has no meaning unless we read "equal" to mean "substantially or approximately equal."[25]

Not only has "equal ability" been interpreted to mean "relatively equal" or "substantially equal" but these terms have been interpreted to mean that the difference in abilities of employees must be demonstrably greater, if seniority rights are to be avoided.[26] The difference in ability may not be so slight as to cause doubt or to leave room for reasonable question.[27] A minor difference in ability is insufficient; the difference must be great enough to mean an appreciably superior performance.[28] Practices of arbitrators which ignore minor differences of ability are also illustrated by the awards of impartial chairmen in the full-fashioned hosiery industry, as the following procedure indicates:

> The determination of "approximately equal" ability must be approached in a realistic manner. Where a number of workers have exhibited nearly the same abilities, he (the Impartial Chairman) has favored placing all of them in the same eligibility group from which promotions can be made according to seniority. Here again, there has been an attempt to establish definite ability ranges within which differences would not be considered impor-

25. Opinion of Benjamin Aaron, in re Mole-Richardson Co. (1949) 12 LA 427; see also in re Combustion Engineering Co., Inc. (1953) 20 LA 416; Poloron Products of Pennsylvania, Inc. (1955) 23 LA 789.
26. In re E. I. DuPont de Nemours and Co. (1952) 18 LA 536.
27. In re Southern Bell Telephone and Telegraph Co. (1951) 16 LA 1.
28. In re Carnegie-Illinois Steel Corp. (U.S. Steel) (1946), Docket No. C1-31; E. I. DuPont de Nemours and Co. (1952) 18 LA 536.

tant. The Impartial Chairman has stated simply that the rule of reason should apply and that ability ratings should not be too finely calculated.[29]

b. *Equality of Ability and Seniority*

The seniority provisions reflecting this view lie somewhat between the primacy given ability considerations in the provisions discussed above, and the primacy given seniority in the so-called "sufficient ability" clauses discussed below. Their distinguishing characteristic, if it may be termed such, is the failure of negotiators to indicate whether seniority or ability should be accorded most weight, as in the following examples of contract provisions:

> . . . employees with seniority standing taking into consideration the ability and aptitude of these employees, shall be laid off in reverse order of their ranking on the seniority list.[30]
>
> In the filling of any vacancy . . . the Employer will choose a person based on his or her seniority and ability to perform the job.[31]
>
> Seniority and qualifications shall govern all promotions.[32]
>
> Seniority and qualifications shall govern promotions in the bargaining unit, due consideration being given both factors.[33]

There has been no uniformity in the way such clauses have been interpreted by arbitrators, presumably since even in their own minds, the negotiators had not reached substantial agreement on the consideration to be accorded seniority. In one case, the decision was markedly similar to the interpretations of provisions according ability primary consideration.[34] The major departure in the interpretation of the clauses giving equality to seniority and ability arises when the issue revolves about substantial differences in the seniority-standing of employees under consideration. Under provisions giving primary consideration to ability this issue receives no consideration in the selection of an employee but under a provision giving equality, arbitrators have uniformly taken differences in length of service into account. In one case, the arbitrator found that the employer had improperly promoted

29. Thomas Kennedy, *Effective Labor Arbitration*, Philadelphia: University of Pennsylvania Press, 1948.
30. Campbell Soup Company and United Packinghouse Workers of America, Local 80 (CIO), 1952.
31. Callite Tungsten Corporation and United Electrical, Radio, and Machine Workers of America, Local 448 (CIO), 1948.
32. International Harvester Co. and United Farm Equipment and Metal Workers of America, Local 108 (CIO), 1948.

an employee who had somewhat superior qualifications but approximately half the seniority of the other claimant.[35] Another concluded that where seniority dates are close, it was not unjust to consider relative ability determinative.[36] Thus, this type of contract abuse requires a comparison of not only ability differences among employees, but also a comparison of differences in their seniority.[37]

c. *Sufficient Ability Provision*

The distinguishing characteristic of the sufficient ability provision is that if all candidates have enough ability to perform a job to which they have seniority claims, it is awarded solely on the basis of seniority. Examples of such contract clauses follow:

> Seniority shall govern all promotions in the bargaining unit where the employee has the qualifications to perform the position in a capable manner.[38]
>
> In the case of ability and qualifications deemed by the Company to be adequate, length of service shall prevail.[39]
>
> Promotions shall be based on seniority and qualifications. Qualifications being sufficient, seniority shall prevail.[40]

In almost every arbitration case studied the dispute arose because of the attempt on the part of management to pick the more qualified individual or to read into the job qualifications a higher level of ability than was necessary to adequately fill the job requirements. Arbitrators uniformly interpreted a sufficient ability clause to mean that minimum qualifications satisfy the provision.[41] Furthermore, they tended to rule that comparisons between employees are improper under such a provision, and that senior employees must receive preference provided they have the ability to carry out the essential job duties. In

---

33. International Harvester Co. and United Automobile, Aircraft, and Agricultural Implement Workers of America, Local 305 (CIO), 1953.
34. In re Campbell Soup Company (1952) 19 LA 1.
35. In re International Harvester Co. (1948) 11 LA 1190.
36. In re Callite Tungsten Corporation (1948) 11 LA 743.
37. In re International Harvester Company (1953) 21 LA 183; see also in re Inland Steel Co. (1951) 16 LA 280.
38. International Harvester Company and United Automobile, Aircraft, and Agricultural Implement Workers of America, Local 1012 (CIO), 1953.
39. Raytheon Manufacturing Company and International Brotherhood of Electrical Workers, Local 1505 (AFL), 1950.
40. Dairyland Power Co-Operative and International Brotherhood of Electrical Workers, Local 953 (AFL), 1948.
41. In re Pittsburgh Steel Co. (1953) 21 LA 565; McLouth Steel Corporation (1948) 11 LA 805.

applying this type of contract provision, management must go down the seniority roster and pick the oldest employee who qualifies.[42]

In this connection it is interesting to note that even under contract provisions which do not provide for any consideration of ability, the so-called "straight seniority" provisions, the rulings of arbitrators have interpreted them to allow management to consider at least a sufficiency is lacking, to allow them to fill jobs out of the regular seniority order.[43]

Influence of Job Requirements

Notwithstanding the general contract provisions concerning the weight to be given ability vis a vis seniority in the allocation of job openings, arbitrators have frequently considered the nature of the job requirements as important factors which not only influence the degree of ability required, but define the type of ability necessary.

Where a given contractual provision must be applied to a broad group of employees which includes a cross section of skills from the very lowest to the very highest, flexibility of interpretation becomes highly important. Ideally, the provision should be applied in such a manner that the risks of poorly trained or inefficient workmen on skilled occupations can be reduced at the same time that the desires of workers to advance as far as their skills will take them can be fulfilled. To achieve this combination of goals may require a flexible interpretation of the contractual provision, according strong weight to seniority in the lower-skilled jobs and greater emphasis on ability in those of higher skills. Even in the absence of an agreement to this effect on the part of union and management, many arbitrators have seen fit to apply a flexible standard for considering seniority and ability based on the job requirements.[44]

In addition to the differences in skills involved, there are a num-

42. In re Electric Boat Co. (1948) 11 LA 719; North American Cement Corp. (1948) 11 LA 1109; Fruehauf Trailer Co. (1949) 13 LA 163; Raytheon Manufacturing Co. (1950) 15 LA 291; Central Franklin Process Co. (1952) 19 LA 32; International Harvester Co. (1953) 20 LA 460; Singer Manufacturing Co. (1953) 21 LA 500; Rome Grader Corp. (1953) 22 LA 167.

43. In re Sayles Biltmore Bleacheries, Inc. (1949) 13 LA 110; Wisconsin Motors Corp. (1950) 14 LA 182; also by implication Gondert & Lunesch, Inc. (1949) 11 LA 1079.

44. In re Libby, McNeill & Libby (1950) 14 LA 316. See also in re Phelps Dodge Refining Corp. (1949) 13 LA 682; Universal Atlas Cement Co. (1951) 17 LA 755; Mosaic Tile Co. (1953) 19 LA 758; Combustion Engineering Co., Inc. (1953) 20 LA 416; Rome Grader Corp. (1953) 22 LA 167.

ber of jobs in which the degree of success on the job is directly dependent upon such factors as appearance, personality, or general demeanor. These factors are particularly important, for example, in general sales, customer service, and driver-salesmen categories. Despite the difficulty of measuring such intangible characteristics, the success of the Company is often dependent upon securing the "right" man for a particular position, route, or client. While the idiosyncrasies and prejudices of the customer may be condemned, they cannot be ignored, and the Company must attempt to achieve a greater degree of selection for those particular jobs than is allowed by either seniority or an objective determination of ability allows. In such instances, some arbitrators have seen fit to allow a much broader interpretation of ability to include consideration of such factors as color or even unusual beliefs, provided the evidence indicated that there was reasonable question as to whether the given individual could satisfactorily perform the work involved.[45]

Where a given job contains in it elements of safety, there are even stronger grounds for demanding a strict ability qualification. In such instances, more is involved than mere protection of working rights, or efficiency in company operations, but the lives of fellow workmen and possibly the general public. In instances where safety considerations were raised as a bar to filling jobs with senior employees, arbitrators have been loathe to second-guess the Company determination, and in one case the arbitrator flouted contract terminology in order to allow the Company's determination of ability to stand.[46]

Suggested Criteria for a Proper Degree of Ability

The degree of consideration accorded ability, as opposed to seniority, in the placement of personnel is essentially a matter for nego-

---

45. In re Coca Cola Bottling Co. (1951) 18 LA 757. See also, in re Gisholt Machine Co. (1953) 20 LA 137, where an employee's actions in connecnection with his belief in nudism were properly considered in denying him a vacant job.

46. In re Eagle-Picher Mining & Smelting Co. (1951) 17 LA 205. What makes such a decision interesting is the fact that under the terms of the contract the Company did not have the right to compare relative abilities since the provision read "seniority shall govern if the affected employees are qualified and able." Other cases in which the importance of safety is implied are: in re Autocar Co. (1952) 18 LA 300 and by indirection Seeger Refrigerator Co. (1951) 16 LA 525; Lebanon Steel Foundry (1946) 4 LA 94.

tiators and is expressed in the three basic types of ability provisions: the primary ability, equality or ability, and sufficiency of ability provisions. Many times the particular clause adopted represents the underlying philosophy of the negotiators and their relative bargaining strengths, rather than an attempt to merge the goals of job security, individual initiative, and efficiency of the enterprise. Clauses adopted on those grounds frequently create difficulties in application because they ignore the inter-relationships between the skill and ability provisions and other problem areas of seniority application. They also fail to consider the need to mold the ability provisions to the requirements of the particular work situation which they are designed to regulate.

Most writers on this subject have not laid down standards by which negotiators could be guided in their choice of ability clauses. The one guiding principle which has been widely mentioned is that stricter requirements of ability should be applied in situations of promotions than in those of layoffs. Sumner Slichter, for instance, states:

> Although layoffs may well be based upon strict seniority, promotions need to be based upon merit. Otherwise merit is of no use in helping a man get ahead and an important incentive for efficiency is destroyed.[47]

The above principle implies that plant efficiency may be more easily sacrificed during a period of layoff. Yet this is the very period when the company is being subjected to external stresses and strains, and the importance of efficiency to meet competition is paramount. Nor is it proper to imply that seniority may be more easily sacrificed in promotional opportunities. The employee who is capable deserves the same objective treatment in promotion which his seniority rights assure him in layoff. In short, the principle of separating promotion from layoff fails to grapple with the basic issue of applying seniority provisions under all conditions, namely: the necessity to achieve maximum industrial efficiency along with maximum job security. In the opinion of this writer, contract clauses dealing with seniority rights and the ability to perform work should be oriented in such a way that efficiency of the enterprise and initiative of the individual worker and his job security are equally maintained. On this basis, the degree of consideration which should be given to ability is related to three factors which differ in each work situation. These are: (1) the nature

47. Sumner H. Slichter, *The Challenge of Industrial Relations*, Ithaca, New York: Cornell University Press, 1947, p. 37.

of the job; (2) the size of the seniority unit; and (3) the differences in the abilities of the current work force.

a. *Nature of the Job*

One may be emphasizing the obvious to say that the consideration which should be accorded to ability in relation to seniority may vary with the degree of skill which must be exercised upon given jobs. Where the levels of job skills are high, management cannot take the risk of filling vacancies on the basis of seniority as a primary factor, in either promotion or layoff policy. Where, however, the jobs involved are of relatively low skill, justification of a rigid application of a skill and ability provision becomes much more difficult, in terms of promotion or layoff policy. It is entirely conceivable that the application of a stringent test of ability is far more necessary in a layoff policy where skilled jobs are involved than in a promotion policy for unskilled jobs. Furthermore, where the job requirements are subjective in nature, as in sales positions, management needs the freedom to prescribe what characteristics will be considered as ability, whether they are promoting an employee or transferring him due to lack of work in his own classification. Where the element of danger is present, the freedom of management to choose must be even wider, for the principle of seniority rights must certainly be subordinated to the safety and welfare of all the employees.

The size of the seniority unit or district also has an important bearing on how much consideration should be accorded ability in determining candidates for job vacancies or in determining who may bump into an already occupied job category in the case of a decline in working force. Generally speaking, the larger the seniority district the more attention must be given to ability. This is so because of two problems associated with large seniority districts: wide ranges of skill requirements on various jobs, and less individual job security on the part of each employee.

The larger the seniority district, the wider the range of job skills encountered. Where the district is confined to occupational seniority, this problem is minimized because of the identity of skills required within the occupational classification. Among Crane Operators, First Class, for example, the job requirements should vary slightly. But where the district widens to large departments such as plant-wide seniority, there exists within the seniority unit job requirements which embrace a full spectrum of skills from common labor to the highly skilled trades. Thus the promotion of employees within that district

on the basis of seniority, or even where seniority is a major factor, is likely to result in poor placement of employees since widely varying job requirements necessitate a careful selection and matching of the needs of the job with the abilities of the employee, a matching process which is limited by an overdependence on seniority.

This problem becomes even more acute, however, during a period of reduction of forces. Here, the possibilities of bumping rights exercised throughout wide seniority districts can be frightening. As a result, numerous job changes, untrained operators, double-manning of jobs, and a superficiality of instruction leads to low production and astronomical labor costs. This troublesome situation has been aggravated by the mistaken attitude of negotiators and some arbitrators that a consideration of ability is far more important in cases of promotion than in cases of layoff, and a willingness to allow employees to move about like checkers with only a modicum of ability or aptitude present in their claims for positions which are already filled. In certain cases, the fear of unemployment creates an attitude among senior employees of scrambling for the best available positions somewhat similar to fire-crazed movie patrons scrambling for the nearest exit. That these conditions occur at a time when the affected company is presumably beset by market difficulties which have already occasioned a reduction in work force makes the situation even more troublesome. Indeed, the argument might be advanced that a company could more ably stand the difficulties of training and developing less capable people for promotional vacancies than the stresses and strains of chaotic maneuvering of employees under bumping provisions. For in the former situation, proper planning would provide replacements for promotional vacancies when they occur, and training of long service men for those positions would be initiated. The time necessary to develop these skills and the training costs involved could probably be more easily borne during a period of stable or gradually expanding production. Reduction of forces, however, may result from sharp repercussions in the market which makes planning more difficult and rapid adjustability more important. The critical problem of adjustment to market conditions is made more serious by the resulting low productivity and high labor costs which develop when ability to perform is ignored in times of layoff.

Furthermore, from the standpoint of the employee, the larger the seniority district, the less job security possessed by a given incumbent. Whereas wider seniority districts may give him more over-all employ-

ment security the specific job security he possesses is correspondingly reduced. Individual employment security for the long service worker may be increased because with wide districts he may exercise his seniority rights over a greater number of jobs, so that as his seniority increases, the possibility that it will protect him from absolute layoff becomes greater. But the cost to the employee is less security in his regular job, which now becomes subject to the raids of a larger number of other employees in the seniority unit, some of whom may have greater seniority credits. Thus arises the need for negotiators to draw some balance between the conflicting desires of workers for both over-all employment security and specific job security. Where this has not been carefully thought through, clauses which have been designed to create over-all employment security have created so much job insecurity that workers have questioned the value of seniority as a device for maintaining employee security. One solution to this problem is to give more consideration to ability qualifications which would reduce the number of employees who could qualify for any given position.

c. *Differences in the Abilities of the Work Force*

The differences in the abilities of the work force, itself, influence the amount of consideration which should be paid to ability in the construction of proper seniority procedures. Where differences in ability merely represent normal variations in the capabilities of individuals, less consideration may be required. Much greater consideration must be given to ability where there exist abnormal variations in a given work force resulting from the recruitment of workers under different economic conditions or under substantially different selection standards. In many cases, companies which expanded during periods of extreme labor scarcity were forced to hire employees who would have met the qualifications of the jobs into which they were placed under more normal conditions. In some instances the need for employees was so great and competition for available labor so keen that these employees were deliberately placed into job classifications higher than their skills warranted, in order to justify the higher wage rates necessary to attract them. These companies are now saddled with a group of relatively poor employees who nevertheless have seniority standing, in many cases higher seniority standing than those hired later under more normal labor market conditions. Under such circumstances a company must apply ability much more rigidly than

in circumstances where the work force is more homogeneous, lest its competitive ability to stay in business become greatly weakened.

The same consideration must be given ability when selection standards have changed over the years. While the rigid interpretation of an ability clause is no antidote to poor selection policies, it does provide a measure of additional selectivity in cases of promotions, or interdepartmental transfers.

Contribution of Arbitrators in Interpreting Ability

The major contributions which arbitrators have made in the interpretation of the term "ability" lie in clarifying the relatively confused terminology and in providing flexibility in its application under different or changing conditions. The general rule laid down that the present ability of the applicant must be matched against the present job requirements of the position to be filled elucidates one aspect of the factors to be considered in ability. The rule of matching present ability against present job requirements not only clarifies the meaning of ability but is a sound interpretation on practical grounds as well. The emphasis on present skills protects the company from inefficient operation through the placement of senior men who have potential but not present ability to perform the operation. It offers equivalent protection to the worker that his seniority rights will not be restricted through the consideration of extraneous and unnecessary skills, and that his seniority will entitle him to consideration in promotion as far as his capabilities permit. The emphasis on present job requirements also preserves the interests of both groups in almost the same manner by preventing the union from whittling away at job requirements in order to place more emphasis on seniority and by preventing the company from enlarging job requirements in order to gain more consideration for ability. The rule also makes the task of measuring ability considerably easier. Present ability can be more easily and more objectively measured than potential ability. Present job requirements can be more easily determined than potential or future job requirements, the substance of which may never be actually put into effect.

In assessing the degree of consideration to be accorded ability arbitrators have introduced a measure of flexibility that the collective bargaining provisions, themselves, were unable to supply. Even where the seniority provisions have been adopted after careful reflection on the specific problems of a given employer and union, they frequently

lack the flexibility necessary for ideal application. Contract clauses usually apply uniformly over the bargaining unit, which is made up of many individual work situations. Each of these work situations may have unique problems of its own which a blanket application of a standard seniority clause cannot solve. Variations in skills may be higher in some occupations than in others. Measurement of ability may be easy in some lines of work and difficult in others. Thus, what seems needed is more individual treatment of specific problems within the framework of the general seniority provisions.

Arbitrators have supplied this flexibility by taking specific job requirements into consideration. Where skills are low, they give greater consideration to seniority. Where performance depends on subjective characteristics, as in sales work, arbitrators allow companies rather wide latitude in interpreting ability for those jobs. In instances where safety is paramount, arbitrators seem not only to give great weight to ability in placement, but to allow the company rather broad powers to determine what constitutes ability in each individual instance.

The analysis of arbitration decisions in the area of seniority districts is beyond the scope of this study, so the extent to which flexibility has been introduced into the consideration of ability in relation to the size of the seniority district cannot be determined. Nor has any study been made of the influence of great variations in ability of the working force on the consideration given to ability vis a vis seniority. It is unlikely, however, that the latter problem could be resolved through arbitration, since it is largely concerned with the negotiation of a particular ability provision rather than with the interpretation of it through the grievance procedure.

A CONSTITUTIONAL GUARANTEE OF ARBITRATION

by Phanor J. Eder

Exploration in one field occasionally leads to the discovery of a precious nugget unrelated to our search. Such is the case with the short lived but famous and influential liberal Cadiz constitution of 1812 for the Spanish Monarchy, including the American colonies. This constitution includes a guarantee of private arbitration, probably unique in the history of constitutional law and of arbitration, except for the few Spanish-American constitutions which copied it.

Articles 280 and 281 of the Cadiz constitution provide:

> 280. No Spaniards can be deprived of the right of terminating their differences by means of judge-arbitrators chosen by both parties.
>
> 281. The judgment of the arbitrators shall be carried into execution if the parties should not have reserved the right of appeal upon making the agreement for arbitration.

The succeeding articles, 282 and 283, make reconciliation proceedings before the local judge (*alcalde*) a prerequisite to bringing suit in the courts.

In the Preliminary Discourse read in Parliament (the *Cortes*) by the Constitutional Committee upon presenting the draft of the constitution, it was stated:

> "To the fundamental law it appertains not only to regulate the relations of the tribunals among themselves, but also to fix the principles which the judges ought to observe in the administration of justice; it being the province of positive law to determine the rules for formalizing the process and all the other acts proper to the exercise of the magistracy. The right which every individual of a society has to terminate his differences by judge-arbitrators is founded on the incontrovertible principle of natural liberty. Our ancient Constitution and our laws have recognized and preserved it in the midst of the vicissitudes which they have suffered since the time of the Gothic monarchy; and the spirit of concord and liberality which renders

so respectable the institution of judge-arbitrators, shows how advantageous it would be that the alcaldes of the towns should exercise the office of conciliation in civil matters and injuries of minor importance, in order to prevent as much as possible the originating or multiplying of suits without sufficient cause."

Why the draftsmen deemed it necessary to include this provision for arbitration is not further disclosed. There does not seem ever to have been any interference with the right to arbitrate or with the enforcement of awards, nor, since the 15th century, with the free choice of arbitrators by the parties. Probably it was included as a matter of thoroughness, since the constitution included lengthy and detailed provisions as to the judiciary and as to procedure which, according to our views, would be more appropriate in legislation than in a constitution.

There was ample justification for the Committee's statement that the Spanish constitution and laws had recognized and preserved arbitration. Arbitration had for centuries taken deep root in Spain and had a long and consistent legislative history.

The earliest code, the *Fuero Juzgo* or Visigothic Code (final form, 694) provided (Book 2, Title 1, Law 13):

"No one shall be a judge in a suit unless he has been commissioned by the Prince or chosen as judge by the will of the parties under the attestation of two good men or three. . . ."

Several of the early municipal charters or *fueros* refer to arbitration. One is cited as early as 1076, the *Fuero* of Sepulveda.

The *Fuero Viejo* of Castille (circa 1212), Book 3, Title 1, Law 1, recited:

"This is the Fuero (charter or law) of Castille: If any man have a controversy one against the other and both parties have agreed to place it in the hands of friends, and have signed, they cannot withdraw it from their hands, except for fair causes, and they are these."

The law then enumerates the four causes, which may be summarized: 1. reservation of the right to withdraw; 2. the death of the arbitrators or of a majority; 3. failure by the arbitrators to reach an agreement; 4. if an arbitrator, a cleric for example, is subject to the orders of a superior who prohibits him from acting. There is a further prohibition against the substitution of an arbitrator, even by order of the court, unless the parties have agreed in advance to substitution.

The *Fuero Real* (1255) substantially repeats the rule of the

Visigothic Code (Book 1, Title 7, Law 2). The prologue of the *fuero* refers to arbitral awards as constituting a species of case law, a practice to be frowned on thereafter.

The *Especulo,* a title reminiscent of the contemporary *Mirror of Justices,* of England, also refers to arbitrators and exempts them from some of the incapacities prescribed for ordinary judges (Book 4, Title 2, Law 2). This Code, issued by Alfonso the Wise, is of uncertain date, perhaps earlier but more probably later than the *Fuero Real.*

The famous *Siete Partidas* of King Alfonso the Wise (published in 1263, but not given the force of positive law until 1348) treats of arbitration at great length in Part 3, Title 4, Laws 23 to 35. Much of it is derived from the lengthy provisions of Justinian's Digest or Pandects (Book V, Title 8) and Code (Book II, Title 56), but with a characteristic Spanish flavor. The *Partidas* introduced, or rather formally recognized, an innovation which has persisted in Spain and its former colonies to this day, viz: the distinction between arbitrators *stricti juris* and amicable compounders.

Parts of the *Siete Partidas* were in force in Louisiana and the provisions of the Louisiana Civil Code on arbitration seem to have been derived from them. The Code Napoleon, the chief basis of the Louisiana Code, contains no similar provisions. The present Code (former articles 3076 and 3077) prescribes:

> "Art. 2109. There are two sorts of arbitrators. The arbitrators properly so called, and the amicable compounders.
>
> Art. 3110. The arbitrators ought to determine as judges, according to the strictness of the law.
>
> Amicable compounders are authorized to abate something of the strictness of the law in favor of natural equity.
>
> Amicable compounders are, in other respects, subject to the same rules which are provided for the arbitrators by the present title."

The more picturesque language of the *Siete Partidas,* with broader powers for amicable compounders, reads:

> "*Arbitri,* in Latin, means in Castilian, arbitrators who are selected and appointed by the parties to decide a controversy existing between them. They are of two kinds: first, when men place their disputes and controversies in their hands to be heard and decided according to law . . . above all, they must render final judgment as they think they should do in law. The other

kind are those called in Latin, *arbitratores,* which means mediators (*alvedriadores*) and common friends, who are selected at the pleasure of both parties, to settle and decide controversies between them in any way whatsoever they deem proper."

The amicable compounders (*alvedriadores*) however could not act arbitrarily, since *albedrio,* in its technical legal sense, meant "customary law or unwritten legal custom."

The Latin American codes or modern statutes reproduce the distinction of the *Siete Partidas. Arbitri* must act strictly according to law. Amicable compounders act without subjection to legal technicalities, are not bound by strict principles of law, but render their award in good conscience to the best of their judgment and belief according to natural equity, *ex aequo et bono.*

Space does not permit an enumeration, even a summary, of the precepts of the *Siete Partidas.* A few notes must suffice. The decision of the amicable compounders must be made in good faith and without fraud; otherwise it is subject to review by a jury of "good men", appointed by the judge. (In practice, this was disregarded and review was made directly by the judge.) Arbitrators were limited to the issues submitted to them in the arbitration agreement; the parties were bound to abide by the decision or to pay the penalty stipulated in the agreement. (The general practice was to provide a penalty.) Any matter whatsoever could be submitted to arbitration, except offenses entailing punishment or relating to liberty or the common weal and matrimonial causes; ordinary tort actions were arbitrable. Judges could not be arbitrators *stricti juris,* but could act as amicable compounders. A special power of attorney or an express clause in the power was required to enable an agent to enter into arbitration on behalf of his principal (this seems to be almost universal law). Law 26 stated: "Arbitration is something which men should earnestly desire to have recourse to and especially such as have a suit or controversy over any matters in which they seek justice." The duties of arbitrators were specified and provision made as to umpires. The arbitrators must render their decision within the time set, unless extension is agreed to by mutual consent. If an arbitrator dies or becomes incapable, the arbitration ceases, unless otherwise provided in the agreement. Once having accepted, the arbitrators are bound to act except for good cause, e.g. if the parties resort to court or insult an arbitrator or the latter has to go on a pilgrimage or attend

to his own urgent business. The arbitral award is entitled to execution by the ordinary judge. No appeal was allowed.

The *Ordenanzas Reales de Castilla* (1484) recognized voluntary arbitration. The greater part of its thirty laws on the subject were reproduced in the *Novissima Recopilación* (1805), which also included several other enactments of earlier date (1489, 1502, 1503, 1509, etc.). Correcting abuses that had sprung up, one of these early decrees again prohibited judges from acting as arbitrators *stricti juris*; another prohibited them from interfering with the free choice of arbitrators. Another provided for execution of the awards, without appeal, if properly rendered (*Novissima Recopilación,* Book V, Title 1, Law 17, and Title XI, Law 5; Book XI, title XVIII, law 4; this last maintaining the distinction between arbiters *stricti juris* and amicable compounders).

The Commercial Ordinances of the Consulate of Burgos (1538) made it the duty of the Prior and Consuls to urge prospective litigants to arbitrate (No. XVII).

Under the Commercial Code, known as the *Ordenanzas de Bilbao* (1737) a compulsory arbitration clause was required in partnership agreements. Chapter X, Article 16, provided:

> "And because upon the termination of companies when the parties in interest are adjusting their accounts doubts and differences customarily arise between them, which lead to lengthy and costly suits capable of ruining them all, as experience has shown: to avoid such harm and in order that such doubts, differences and controversies be decided summarily: it is ordered: all those who form a company must stipulate and place a clause in the instrument they execute in which they say and declare that as to the doubts and differences which may, during its course or at its termination, arise, they obligate themselves and submit to the judgment of two or more practical persons whom they or the judge of his own motion may appoint and that they will abide by and accept what they summarily judge, without other appeal or suit whatsoever; which clause they must guard and accept under the conventional penalty, which must be imposed, or the discretionary penalty the judge may fix."

The Ordinances of Bilbao continued in force in the Spanish-American countries until well into the 19th century, in Mexico as late as 1884.

Such then was the law in the Spanish colonies in America at

the time of Independence. The Cadiz Constitution itself was in force in war-torn Mexico for a few years and was joyously proclaimed also in Peru, perhaps elsewhere. It is natural that these provisions should have been followed in later constitutions.

The Provisional Political Regulation of Iturbide's Mexican Empire (1822), which extended to Central America, provided:

> "Article 71. The conciliation Board in the terms heretofore practiced must precede every civil or criminal complaint. And in order that such an interesting institution may be more efficacious, it is ordered that the good men presented by the parties shall either not be lawyers or if they be, they shall not later be admitted in the court to defend the same parties in case the suit, the subject-matter of the conciliation, be prosecuted."

The Constitutions of Mexico of 1824 (arts. 155, 156) and of 1836 (arts. 39 and 40) and the Organic Bases of 1843 (arts. 185 and 186) repeated the principles of the Cadiz Constitution, both as to arbitration and conciliation, but in different phraseology. The provisions were omitted in the 1857 Constitution.

The 1824 Constitution of the Federation of Central America also followed the Cadiz Constitution in this regard, but inserted the provisions more logically, at least as to arbitration, in the Bill of Rights, arts. 171 and 172, the latter reading:

> "Art. 172. The power to appoint arbitrators at any stage of the suit is inherent in every person; the judgment the arbitrators render is not appealable, if the parties have not reserved such right."

The articles were repeated in the amended constitution of 1835, as articles 177 and 178, with a slight change of language.

The Central American Federation was short lived; it broke up in 1838, but the provision as to arbitration found its way into the constitutions of Costa Rica, Honduras, Nicaragua and Salvador, sometimes in the Bill of Rights, sometimes under the caption of the Administration of Justice or the Judicial Power.

In Costa Rica it appears in all the constitutions, the phraseology changing. In its present form (1949 constitution), it reads:

> "Art. 43. Everyone has the right to settle his differences in civil matters by means of arbitrators, even after a law suit has been instituted."

The present form of the Salvador constitution (1950), in its Bill of Rights, is as follows:

"Art. 174. Freedom of contract in conformity with the laws is guaranteed.

"No person who has the free administration of his property can be deprived of the right to terminate his civil or commercial matters by arbitration. As to those who do not have such free administration, the law shall determine the cases in which they may do so and the necessary requisites therefor."

Previous constitutions of El Salvador (1841, art. 89; 1864, art. 94; 1871, art. 120; 1872, art. 38; 1880, art. 134; 1886, art. 17) had adopted the Federation formula, watered down by adding, in the 1871, 1872 and 1880 constitutions, "except in the cases expressly exempted by statute." The present (1950) constitution repeats the language of the 1886 constitution.

In Honduras, copied from the Federation Charter, the provision had a more checkered career; in some constitutions, it figured under the Bill of Rights (1848, art. 110), in others under the Administration of Justice (1839, art. 74; 1894, art. 132; 1936, art. 80): several of the constitutions (1865, 1873, 1880, 1906) omitted it and it does not appear in the present constitution (1957).

In Nicaragua, the first constitution (1826, articles 120, 121) repeated substantially the Cadiz formula both as to arbitration and conciliation; the 1838 constitution (art. 158) repeated the Central American wording. Omitted in the 1854 and 1858 constitutions, the arbitration provision alone reappeared in the 1893 constitution (art. 123), to be finally eliminated by the 1896 amendments (art. 47).

The first Venezuelan Constitution of 1830 (under its General Provisions, in effect the Bill of Rights) included arbitration in a more general formula, viz:

"Art. 190. Venezuelans are free to terminate their differences by arbitrators, even though suits have been instituted, to change their domicile, to absent themselves from the State, taking with them their property and to return to it, provided they observe the legal formalities and to do everything that is not prohibited by law."

Repeated in the 1857 constitution (art. 100), the provision as to arbitration does not seem to appear in any of the later constitutions of Venezuela.

I have met no reference to arbitration in any of the other South American constitutions, but as there have been about eighty constitutions in the other nine countries, exclusive of state and pro-

vincial constitutions, I do not pretend to have searched them all. The conclusion, however, is inescapable that in the Spanish-speaking world belief in the advisability of arbitration for *existing* disputes is so deep-rooted as to have warranted constitutional protection. This leads to the hope that these historical notes may be of help in the campaign now being waged in Latin American countries to modernize their arbitration statutes, to simplify some of the requirements, to make agreements to arbitrate *future* disputes enforceable and to provide effective execution of awards.

REFERENCES

Alcubilla: *Códigos antiguos de España.* Madrid 1885.

Asso and Manuel (Tr. Johnston): *Institutes of the Civil Law of Spain.* London 1825, 292-295.

Discurso Preliminar, leído en las cortes al presentar la comisión de constitución el proyecto de ella. Cadiz 1812; *reimpreso en* Madrid 1820; Barcelona id. 1820.

Preliminary Discourse read in the Cortes at the presentation of the Project of the Constitution by the Committee of the Constitution. To which is added the Present Spanish Constitution (Translated exclusively for The Pamphleteer) (London 1823).

Enciclopedia Espasa, Vol. 5, 1244 *seq.* (Arbitraje): Vol. 24, 1518 *seq.* (Fuero): Vol. 10, 335-340 (Cortes de Cadiz).

Escriche: *Diccionario Razonado de Legislación y Jurisprudencia* (9th ed.) Paris. Mexico 1907.

Fitzgibbon: *The Constitutions of the Americas.* Chicago 1948.

Moreau Lislot and Carleton (Tr.): *The Laws of the Siete Partidas which are still in force in Louisiana.* New Orleans 1820, vol. 1, 92-107 (Partida Third, Title IV, Laws 23-35).

Peaslee: *Constitutions of the Nations,* 2d. ed. 1956.

Scott, S. P. (Tr.): *The Visigothic Code.* Boston 1910.

The Siete Partidas. Chicago 1931, 576-584.

The Civil Law, 1932, vol. 3, 116-133; vol. 12, 250-253.

DOCUMENTATION

INTER-AMERICAN COMMERCIAL ARBITRATION

Report of the Special Committee on International Commercial Arbitration of the Inter-American Bar Association to the Eleventh Conference in Miami, Florida (April 10-19, 1959)

Arbitration has been of concern to the Inter-American Bar Association since its First Conference in Habana in 1941, where Judge Antonio Sanchez de Bustamante and Professor Philip C. Jessup recommended the use of arbitration as a means of settling economic disputes.[1]

1. Of special interest is the unification of arbitration law and practice in the Americas. In deliberations of the Inter-American Bar Association it has long been recognized that diversity of statutory arbitration law is not conducive to the use of arbitration as an efficient means of settling commercial disputes between businessmen of various countries. As early as 1933, the Seventh International Conference of American States, meeting in Montevideo, recommended in its Resolution XLI the adoption of certain standards in matters of arbitration procedure and practice which were considered "essential in rules and regulations used by trade and commercial organizations to the successful functioning of the American [arbitration] system."[2] Progress in legislative enactments was limited; only in its law No. 2 of 1938, Colombia followed the recommendations of the Montevideo Conference.[3] Legislative enactments were also recommended at the Conferences of the Inter-American Bar Association in Mexico City (1944), Santiago (1945), Lima (1947) and Detroit (1949).[4]

1. William Roy Vallance, Commercial Arbitration considered at the Havana Conference of the Inter-American Bar Association, 6 Arbitration Journal 136 (1942).
2. For references, see Martin Domke, Inter-American Commercial Arbitration, 4 Miami Law Quarterly 425 (1950).
3. Diario Oficial No. 23727 of March 11, 1938; see R. L. Backus and Phanor J. Eder, A Guide to the Law and Legal Literature of Colombia 34 (1943).
4. Cp. Phanor J. Eder, Arbitraje Comercial Inter-americano, Memoria de la Tercera Conferencia, tomo II p. 101 (1944).

Unification of the arbitration laws of the Americas was again advanced by the Inter-American Juridical Committee which submitted a draft of a uniform law on Inter-American commercial arbitration on December 21, 1953[5] and, after having received comments by the American Republics, a second draft of December 15, 1954[6] was recommended by the Inter-American Council of Jurists for its adoption at its Third meeting in Mexico City on February 1, 1956.[7] This Draft Uniform Law recognizes the validity of and enforcibility of clauses in contracts providing for arbitration of future disputes arising thereunder. It further provides that a competent judge shall suspend judicial action on a question referable to arbitration; he may also determine the arbitrability of an issue in dispute. The Draft Uniform Law also provides for the appointment of arbitrators by the parties or an agency such as the Inter-American Commercial Arbitration Commission. Other provisions permit the filling of vacancies and replacements of arbitrators in the manner of the original appointment. Majority awards of an arbitration board shall have the force of a final judgment of the court. Though there may be no appeal on the merits of arbitration awards, recourse to judicial authority is made possible to prevent abuses and to protect the rights of the parties.

The Inter-American Bar Association at its Ninth Conference in Dallas recommended on April 27, 1956 the adoption by the American States of the Draft Uniform Law on Inter-American Commercial Arbitration by the various American Republics in accordance with their constitutional procedures.[8] The Draft Uniform Law has not yet passed any legislature of the American Republics. The Special Committee recommends that the Resolution of the Inter-American Bar Association of April 27, 1956 again be given consideration.

2. A new impetus for unification of arbitration law and practice has occurred with respect to the most important aspect of international commercial arbitration, namely the enforcement of awards in a country other than where the award had been rendered. The

5. See Exposicion de Motivos del Proyecto de Ley Uniforme sobre Arbitraje Comercial Internacional, Comite Juridico Interamericano. Recomendaciones e Informes p. 429 (1955).
6. Department of International Law, Pan-American Union CIJ—20 (1955): text also in 10 Arbitration Journal (N.S.) 94 (1955).
7. Final Act of the Third Meeting of the Inter-American Council of Jurists, p. 23 (Pan-American Union, 1956, CIJ—29).
8. Inter-American Bar Association, Proceedings of the Ninth Conference 88, 292 (1956).

United Nations Conference of International Commercial Arbitration adopted on June 10, 1958 a Convention on the Recognition and Enforcement of Foreign Arbitral Awards which was signed by Argentina, Costa Rica, Ecuador and El Salvador.[9]

It is recommended that the signatory countries pass appropriate legislation to put the Convention into effect. It is further recommended that other countries of the Americas accede to this Convention in accordance with their constitutional provisions.

3. In addition, the United Nations Conference on International Commercial Arbitration passed a Resolution on June 10, 1958 on possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes. The Resolution which was made part of the Final Act of the United Nations Conference[10] was accepted not only by the countries which had signed the Draft Convention, but also by Brazil, Colombia, Guatemala, Panama, Peru and the United States of America. Here again implementation of this Resolution should be given prompt consideration by the aforementioned countries and by other American States. This implementation may be achieved through wider diffusion of information on arbitration practices, laws and facilities, the establishment of new agencies and the improvement of existing arbitration facilities; and technical assistance in the development of effective arbitral legislation and institutions.[11]

The Special Committee recommends that the Inter-American Bar Association pass the following resolutions:

A) The Inter-American Bar Association reiterates that the Draft Uniform Law on Inter-American Commercial Arbitration of February 1, 1956, as approved by the Inter-American Council of Jurists be adopted by the Legislative bodies of the American States, in accordance with their constitutional procedures.

B) The Inter-American Bar Association further recommends that the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as adopted by the United Nations Conference on International Commercial Arbitration on June 10, 1958, be ratified by the American States who had signed the Convention, and be acceded to by the other American States and likewise considered

9. United Nations DOC. E/CONF. 26/8/Rev. 1, of June 10, 1958.
10. United Nations DOC. E/CONF. 26/9/Rev. 1, of June 10, 1958.
11. United Nations DOC. E/3211 of February 17, 1959, Note by Secretary General on "International Commercial Arbitration."

for legislative enactment by their respective legislative bodies.

C) The Inter-American Bar Association further recommends that all States of the Americas give prompt consideration to the Resolution of the United Nations Conference on International Commercial Arbitration on other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes.

Special Committee on International Commercial Arbitration
of the Inter-American Bar Association

Ezequiel Padilla, *Chairman* (Mexico)

Angel Francisco Brice (Venezuela)
Martin Domke, Secretary (U.S.A.)
Phanor J. Eder (U.S.A.)
David E. Grant (U.S.A.)
Felix Esteban Guandique (Nicaragua)
Jimenez de Arechaga (Uruguay)
Francis Salgado (Haiti)
Alberto Ulloa (Peru)

March 20, 1959

Editor's Note: *Resolutions A, B and C were adopted in the plenary session of the Conference on April 17, 1959.*

RESOLUTION OF THE U.N. ECONOMIC AND SOCIAL COUNCIL ON INTERNATIONAL COMMERCIAL ARBITRATION APRIL 20, 1959

On June 10, 1958, *the United Nations Conference on International Commercial Arbitration adopted a resolution "on other measures for increasing the effectiveness of arbitration in the settlement of private law disputes." This resolution, printed in the* Arbitration Journal 1958 *p.* 113, *was more recently implemented at the XXVIIth Session of the U.N. Economic and Social Council in Mexico City. The text follows.*

The Economic and Social Council,

Recognizing the value of arbitration as an instrument for settling disputes,

Considering that increased resort to arbitration in the settlement of private law disputes would facilitate the continued development of

international trade and other private law transactions,

Considering further that substantial contributions have been made to this end by measures designed to strengthen and promote the recognition of the legal status of international private law

Recognizing that measures to improve the legal status of arbitration should be accompanied by measures in the fields of arbitral organization and procedure, by educational activity and by technical assistance, if arbitration is to attain maximum usefulness in the development of international trade and other private law transactions,

Noting the resolution adopted by the United Nations Conference International Commercial Arbitration on 10 June 1958, which recognizes the value of practical measures in these fields,

Believing that, in addition to the contributions of inter-governmental and non-governmental organizations, much can be done directly and immediately through the initiative of Governments and of arbitration organizations to increase the effective use of arbitration,

1. *Expresses the wish* that arbitral associations, whether constituted along local, trade, national or international lines, give particular attention and emphasis to educational activities, especially among business and professional groups, to the establishment where necessary of new arbitration facilities or improvement of existing ones, and to facilitating international private law arbitrations;

2. *Invites* Governments to consider sympathetically any measures for improving their arbitral legislation and institutions, to encourage interested organizations in the development of arbitration facilities and related activities, and to avail themselves of appropriate opportunities to obtain or to furnish, as the case may be, technical advice and assistance;

3. *Suggests* that inter-governmental and non-governmental organizations active in the field of international private law arbitration co-operate with each other and with the United Nations organs concerned, especially in the diffusion of information on arbitration laws, practices and facilities, educational programmes, and studies and recommendations aiming at greater uniformity of arbitration laws and procedures;

4. *Recommends* that the regional economic commissions of the United Nations which have not as yet included such a project in their programme of work, consider the desirability of undertaking a study of measures for the more effective use of arbitration by Member States in their regions;

5. *Requests* the Secretary-General to assist, within the limits of avaliable staff and financial resources, Governments and organizations in their efforts to improve arbitral legislation, practice and institutions, in paticurlar by helping them to obtain technical advice and assistance from appropriate sources available for this purpose and by providing guidance to Governments and organizations concerned in co-ordinating their effotrs and promoting more effective use of arbitartion in connexion with international trade and other private law transactions.

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

EXCHANGE OF LETTERS BETWEEN SHIPOWNER AND SHIPPER OF CARGO IN WHICH THE LATTER AGREED TO BE RESPONSIBLE FOR DEMURRAGE HELD NOT TO CONSTITUTE AN AGREEMENT TO ARBITRATE. The court said: "The exchange of letters is brief and unequivocal. It contains no language by which the respondent Company might be deemed to have agreed to resort to arbitration. The Company by guaranteeing the shipper's obligation under the bill [of lading, which called for arbitration in London], did not agree to arbitrate any dispute as to the measure of that obligation." *Compania Maritima Ador, S.A. v. Navico, A.G.,* 173 F. Supp. 839 (S.D. N.Y., Palmieri, J.).

"CHARTER PARTY MAY BE INCORPORATED INTO A BILL OF LADING BY REFERENCE, BUT THE REFERENCE MUST BE SUFFICIENTLY SPECIFIC AS TO LEAVE NO DOUBT AS TO THE INTENTION OF THE PARTIES." *Industria E. Comercio de Minerios, S.A. v. Nova Genuesis Societa per Azioni per L'Industria et Il Comercio Maritimo,* 172 F. Supp. 569 (E.D. Virginia, Hoffman, J.).

ARBITRATION CLAUSE IN CONSTRUCTION CONTRACT WITH PENNSYLVANIA TURNPIKE COMMISSION WHICH WAS LIMITED TO 'ADDITIONAL COMPENSATION FOR ANY WORK PERFORMED WHICH WAS NOT COVERED BY THE APPROVED DRAWINGS, SPECIFICATIONS, OR CONTRACT, OR FOR ANY OTHER CAUSE HELD INAPPLICABLE TO DISPUTE OVER BREACH OF CONTRACT AND DEMAND FOR PAYMENT UNDER THE TERMS OF THE CONTRACT. The court said: "The arbitration coverage in the instant case is definitely limited to matters of 'measurement and payment' having to do with the fulfillment of the contract and nothing else. The words 'or for any other cause' must be considered with the words preceding them and must be read as meaning 'other such like'." The Commission's motion for a stay of action pending arbitration was therefore denied. *Badgett Mine Stripping Corp. v. Pennsylvania Turnpike Commission,* 173 F. Supp. 425 (M.D. Pa., Follmer, J.).

COURT ACTION STAYED AND ARBITRATION OF EXTRAS ARISING OUT OF CONSTRUCTION CONTRACT DIRECTED. The court held that the broad clause for submission to arbitration "'of all questions that may arise under this contract and in the performance of the work thereunder" applies to such questions as "those which involve an interpretation of its provisions for the purpose of determining whether work has been done according to contract, whether work which has been demanded under the contract is really covered by its provisions or constitutes extra work, when payments become due, and so on." *Siegfried v. Katz,* 16 Misc. 2d 649 (Walsh, J.).

II. THE ARBITRABLE ISSUE

COURT OF APPEALS AFFIRMS APPELLATE DIVISION ORDER (digested in *Arb. J.* 1958, p. 231) **THAT IT WILL NOT PASS ON QUESTIONS OF ARBITRABILITY SUBMITTED TO THE ARBITRATOR AFTER PARTY PROCEEDED WITH PARTS OF ITS CASE ON THE MERITS AND SUBMITTED A BRIEF ON ITS RESERVATIONS.** *Iino Shipbuilding & Engineering Co., Ltd. v. Hellenic Lines Limited,* 5 N. Y. 2d 987, 184 N.Y.S. 2d 853.

WHERE CONTRACT STATED THAT PARI-MUTUEL MACHINE SUPERVISORS WERE TO BE "ASSIGNED TO A SELLING WINDOW EACH DAY AND SELL TICKETS FOR EACH RACE," DISPUTE OVER SUCH ASSIGNMENT DID NOT RAISE AN ARBITRABLE ISSUE SINCE THE CONTRACT PROVIDED THAT THE ARBITRATOR COULD NOT MODIFY OR REWRITE THE AGREEMENT. *Pari-Mutuel Employees' Guild, Local 280, Building Service Employees Int'l Union v. Los Angeles Turf Club, Inc.,* 337 P. 2d 575 (Cal. App. Second Dist., Ashburn, J.).

CONNECTICUT SUPREME COURT HOLDS THAT COMPANY'S CLAIM THAT INCREASE IN DUES AND INITIATION FEES FOR UNION MEMBERS IS DISCRIMINATORY AND EXCESSIVE IS NOT ARBITRABLE UNDER COLLECTIVE BARGAINING AGREEMENT, SINCE IT INVOLVES AN INTERNAL UNION ISSUE. The court said: "The amount of the initiation fee and the dues charged to members of the union are ordinarily internal affairs of the union. The company does not claim that in authorizing a deduction of $10 a week the union is exceeding the provision of the contract which requires the plaintiff to deduct only $5. It claims, flatly, that the amount of the initiation fee and the dues is excessive and discriminatory. While the Contract contains broad provisions for the arbitration of grievances and disputes between the company and the union, the submission fails to set out any issue that is discriminatory against the plaintiff, as distinguished from one which, it claims, is discriminatory against the members of the union whom it employs." *Stamford Transit Co. v. Int'l Bro. of Teamsters, Local 145,* 32 LA 634 (Conn. Supreme Ct. of Errors, Murphy, J.).

DISPUTE OVER CONTRACTING OUT HELD NOT ARBITRABLE DESPITE BROAD ARBITRATION CLAUSE IN COLLECTIVE BARGAINING AGREEMENT. In reversing the Special Term finding that the issue was arbitrable (digested in *Arb. J.* 1959 p. 103), the Appellate Division said: "Concededly, the agreement contains no express provision prohibiting appellant from contracting out work. The court is required to determine whether the dispute relates to a matter within the scope of the collective bargaining agreement and whether it is arbitrable under the arbitration clause thereof. Respondent union has failed to carry the burden of establishing the existence of an arbitrable dispute." *Otis Elevator Co. v. Carney*, 8 App. Div. 2d 636 (Second Dept.).

WASHINGTON STATE COURT HOLDS THAT DISCHARGE OF UNDESIRABLE EMPLOYEE IS NOT ARBITRABLE WHERE THE CONTRACT DOES NOT LIMIT THE RIGHT TO DISCHARGE WITHOUT JUST CAUSE AND THE ARBITRATION CLAUSE ONLY INVOLVES THE INTERPRETATION OF THE PROVISIONS OF THE CONTRACT. The court said: "The limitations on the right to fire are that the employer can not fire because of union membership or to avoid seniority or rehire provisions. It can be argued that any discharge affects seniority rights, but the test is properly if the direct purpose is to affect said rights then it would be arbitrable whereas it would not be subject to arbitration if the violation of any of the foregoing sections was only incidental to the real reason." The court further noted that under the agreement "the parties affirmatively state this type of discharge (strike, work stoppage) is subject to arbitration. If the intention of the parties was to have the cause of every discharge subject to arbitration, [that provision] would be meaningless." *Hanford Guards Union of America, Local 21 of Int'l Guards Union of America v. General Electric Co.*, 32 LA 860 (Washington Superior Court, Franklin County, Lawless, J.).

IN THE ABSENCE OF A SPECIFIC CONTRACT PROVISION, FEDERAL COURT, AFTER EXAMINING THE AGREEMENT TO ASCERTAIN THE INTENTION OF THE PARTIES, HELD THAT THE ISSUE OF UNION'S PROCEDURAL COMPLIANCE IN DISPUTE OVER DISCHARGE DOES NOT PRESENT AN ARBITRABLE ISSUE DESPITE THE CONCEDED ARBITRABILITY OF THE SUBSTANTIVE QUESTION. The Union argued that the question of compliance was for the arbitrator, while the company contended that the union had waived its right to arbitrate. The court said: "A claim respecting the timeliness of the request for review in arbitration of a dispute as to the meaning of 'final answer' (in the grievance procedure) goes to the 'interpretation and application of any term of the agreement' and would therefore by nature be an arbitrable claim. However Article VIII of the Agreement, the arbitration provision, suggests by its terms that any dispute, in order to be considered an arbitrable dispute, is one that has been the subject of attempted negotiation and settlement between the parties. In this sense, the claim as to procedural compliance has not been discussed between the parties prior to the commencement of this action, nor

has it been made the subject of the grievance procedure. Such a claim, raised as a defense in this action, is not an arbitrable dispute at this time." *Brass & Copper Workers Federal Labor Union No. 19322 v. American Brass Co.*, 172 F. Supp. 465 (E. D. Wisc., Grubb, J.).

QUESTION OF DAMAGES FOR BREACH OF A NO-STRIKE CLAUSE HELD NOT TO BE AN ARBITRABLE ISSUE AND SOLELY ONE FOR THE COURT TO DECIDE. The court said: "Plaintiffs presented evidence tending to show the measure of their damages resulting from the work stoppage. I find that the contract between the parties did not expressly contemplate that such issue of damages was a dispute or controversy to be settled by grievance and arbitration procedures. Further, since this strike concerns a violation of the no-strike clause it is not a grievance referable to arbitration. As I have found that the Union breached the contract when it induced the work stoppage, as the trier of fact I shall determine the amount of damages to which the company is entitled." *Structural Steel & Ornamental Iron Assoc. of New Jersey, Inc. v. Shopmen's Local Union No. 545 of the Int'l Assoc. of Bridge, Structural and Ornamental Iron Workers*, 172 F. Supp. 354 (D.C. N.J., Wortendyke, J.).

ARBITRATION CLAUSE IN COLLECTIVE BARGAINING AGREEMENT HELD APPLICABLE TO DISPUTE OVER SENIORITY ON RECALL AFTER STRIKE DESPITE FACT THAT STRIKE WAS SETTLED BY SEPARATE AGREEMENT CONTAINING NO ARBITRATION PROVISIONS. The Appellate Division (Third Department) held that all the accords "became one agreement, and the arbitration clause contained in the original, left unchanged by any supplemental agreement, applied to the entire agreement between the parties as amended and supplemented." *National Cash Register Co. v. Wilson*, 7 App. Div. 2d 550, 184 N.Y.S. 2d 957 (Coon, J.).

QUESTION OF ARBITRABILITY OF ALLEGED DISPUTE IS ONE FOR COURT TO DECIDE ON PETITION FOR ORDER DIRECTING ARBITRATION, IF "THERE IS NOTHING IN THE COLLECTIVE BARGAINING AGREEMENT TO SUGGEST AN INTENTION OF THE PARTIES THAT ARBITRABILITY OF DISPUTE SHOULD BE SUBMITTED TO THE ARBITRATOR." *Pari-Mutuel Employees' Guild, Local 280, Building Service Employees Int'l Union v. Los Angeles Turf Club, Inc.*, 337 P. 2d 575 (Cal. App. Second Dist., Ashburn, J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

ARBITRATION UNDER A LEASE AGREEMENT OF A MINING CORPORATION IS ENFORCEABLE UNDER MINNESOTA LAW. Said the court: "Prior to enactment of the Uniform Arbitration Act by the Minnesota legislature, the state policy favoring arbitration was unequivocally and clearly enunciated by the State Supreme Court in a case holding an agreement to

arbitrate 'all differences' valid. In a subsequent decision (although stating the case before it was not an action for specific performance), the Court affirmed a trial court order 'declaring the arbitration provisions of the agreement valid and enforceable and further ordering that the parties forthwith proceed to take such action as is required to carry plaintiffs' demand for arbitration through to completion." *Reserve Mining Co. v. Mesabi Iron Co.*, 172 F. Supp. 1 (D. Minnesota, Donovan, J.).

BRAZILIAN SHIPPER WHOSE ORIGINAL CONTRACT WITH ITALIAN SHIPOWNER DID NOT CONTAIN ARBITRATION CLAUSE WAS NOT BOUND BY ARBITRATION CLAUSE IN CHARTER PARTY WITH PANAMANIAN CORPORATION, WHERE EVIDENCE SHOWED THAT AGENT FOR SHIPPER DID NOT HAVE AUTHORITY TO BIND HIM TO THE CHARTER PARTY. The court said: "While ICOMI was the shipper of the cargo, it was not a party to the charter party and it is abundantly clear from the authorities that arbitration cannot be required of those who were not parties to the agreement, either directly or through their agents." *Industria E. Comercio de Minerios, S.A. v. Nova Genuesis Societa Per Azioni Per L'Industria et Il Commercio Maritimo*, 172 F. Supp. 569 (E. D. Virginia, Hoffman, J.).

PREVIOUS ACTION ON PROMISSORY NOTE NOT INVOLVING A DISAGREEMENT DOES NOT AMOUNT TO WAIVER OF ARBITRATION OF OTHER DISPUTES ARISING OUT OF AGREEMENT. A COURT ACTION WAS THEREFORE STAYED PENDING ARBITRATION. *General Distributors, Inc. v. Gershoff*, N.Y.L.J., July 28, 1959, p. 5, Backer, J.).

ALLEGATION OF ARBITRATION IN ANSWER, WHILE INSUFFICIENT FOR PLEADING PURPOSES, "WAS NEVERTHELESS AN ASSERTION THAT RESPONDENTS DID NOT INTEND TO ABANDON THEIR RIGHTS TO DEMAND ARBITRATION." *Kalin Contracting Co. v. Picram Construction Corp.*, 8 App. Div. 2d 637, 185 N.Y.S. 2d 950 (Second Dept.).

FEDERAL COURT DISMISSES ATTEMPT BY EMPLOYEES, NOT PARTY TO ARBITRATION PROCEEDINGS, TO ATTACK AWARD WHICH DETERMINED SENIORITY RIGHTS. The majority opinion characterized the plaintiff(s) as ". . . one who was not even a party to the arbitration proceedings [and who] seeks relief which requires the invalidation of the award in a suit in which the beneficiaries of the award are not present or in any way represented." The dissent felt that the issue was not grounded in the award but was an attempt by the plaintiffs, who presented evidence of collusion by the parties to the arbitration, to force the employer to perform his contract. *Nix v. Spector Freight System, Inc.*, 264 F. 2d 875 (Third Cir., Hastie, G. J.).

FEDERAL COURT REJECTS ATTEMPT BY EMPLOYEES DISCHARGED AS "SECURITY RISKS" TO COMPEL UNION AND COMPANY TO ARBITRATE THEIR GRIEVANCES. The employees refused to supply the company and the union with information on their prior membership in the Communist Party during the grievance procedure sessions which were prompted by their discharge after taking the Fifth Amendment before a Congressional Committee. The Union offered to have the discharged employees confidentially confer with its Counsel who would be bound not to reveal any information by reason of the lawyer-client relationship. The employees with one exception refused. The court, after examining the conflicting cases on the right of an individual employee to compel arbitration, said: "The Affidavit of David J. McDonald, International President of the union, which is uncontradicted, shows that the union has consistently followed the policy that the mere fact that a man has been a member of the Communist Party in the past is not sufficient to justify his discharge, but that the extent of his past activity and his present attitude are factors which should be considered. The Union owes a duty, not only to its membership, but also to the Company and all its employees, not to press grievances which are without merit. Plaintiffs refused to give the Union or its Counsel the information which was essential to such an evaluation. Under these circumstances, the Union was clearly justified in refusing to press the grievances to arbitration." *Ostrofsky v. United Steelworkers of America,* 171 F. Supp. 782 (D. Maryland, Thomsen, Ch. J.).

NEW YORK SUPREME COURT LACKS JURISDICTION TO COMPEL ARBITRATION UNDER A CONTRACT WHICH APPEARS ON ITS FACE TO VIOLATE THE NATIONAL LABOR-MANAGEMENT RELATIONS ACT. In upholding the refusal of Special Term to order arbitration, the Appellate Division said: "If the agreement is invalid the arbitration clause falls with it. Exclusive jurisdiction to determine the validity of the agreement resides in the board under the Federal Statute. Hence, when the issue is raised substantially on the face of the agreement the State Court should not make the initial determination of its validity despite the fact that such validity is a condition precedent to directing arbitration under the agreement." *Klein v. Styl-rite Optics, Inc.,* 8 App. Div. 2d 811, 188 N.Y.S. 2d 421 (First Dept.).

FEDERAL DISTRICT COURT'S ORDER STAYING EMPLOYER'S SUIT FOR INJUNCTION PENDING ARBITRATION AND DECLARING THAT UNION'S BREACH OF CONTRACT RELIEVED HIM OF OBLIGATION TO ARBITRATE IS NOT A FINAL ORDER. Such an order interlocutory is not appealable under Sec. 1291 of the Judicial Code (see *Arb. J.* 1959 p. 40). *Armstrong-Norwalk Rubber Corp. v. Rubber Workers' Local 283,* 28 U. S. Law Week 2050 (C.A. 2d, July 13, 1959).

ARBITRATION WILL NOT BE ENFORCED UNDER SECTION 301(a) OF THE TAFT-HARTLEY ACT WHERE THE UNION FAILS TO PROVE THAT IT COMPLIED WITH THE TIME LIMITS CONTAINED IN THE AGREEMENT. The court said: "This court cannot order defendant

to proceed to arbitration unless it first determines that the conditions precedent to arbitration have been fulfilled, so that defendant (company) in refusing to arbitrate is in breach of its agreement. Here plaintiff (union) has alleged compliance with the contractual provisions as to the timely request for arbitration but has failed to offer any evidence to show such compliance." *Local 201, Int'l Union of Electrical, Radio and Machine Workers, AFL-CIO v. General Electric Co.*, 171 F. Supp. 886 (D. Mass., Ford, J.).

IV. THE ARBITRATOR

EXECUTIVE BOARD OF AMERICAN FEDERATION OF MUSICIANS, WHICH ACTS AS ARBITRATION TRIBUNAL UNDER BYLAWS, HELD TO BE PROPER FORUM FOR DISPUTES BETWEEN MEMBERS. The court said: "Whether or not a union is a competent arbitrator in a dispute between an outside employer and its members is to a high degree questionable. But that is not the case here. Petitioner is a union member and a musician himself. His claim that, because he is also an employer the union would be prejudiced against him is not logically sound. The basis of objection to the union as arbitrator is that it would naturally favor its own people. Many union members from time to time are in the same relative position of employer that petitioner is on this occasion. A prejudice due to community of interest cannot be presumed." An award was therefore confirmed. *Digeorgia v. American Federation of Musicians,* 186 N.Y.S. 2d 517 (Steuer, J.).

WHERE COURT ORDER COMPELLING ARBITRATION SPECIFIED THAT NO ARBITRATOR SHOULD "HAVE ANY CONNECTION OR ASSOCIATION WITH EITHER PARTY OR THEIR ATTORNEYS WHICH WOULD DISQUALIFY A PERSON FROM BEING A JUROR," ARBITRATOR WHOSE LAW FIRM TOGETHER WITH ATTORNEYS REPRESENTING ONE OF THE PARTIES ARE CO-COUNSEL TO AN ESTATE WHICH HAS DEALINGS WITH ONE OF THE PARTIES TO THE DISPUTE, FAILED TO MEET THOSE SPECIFICATIONS. The Appellate Division went on to note that "Moreover, in the course of those transactions, some friction developed between appellant's principal and the head of the arbitrator's law firm. In view of the express qualifications of an arbitrator—contained in the judgment implementing the agreement of the parties to submit to arbitration—," the court sustained the challenge to the arbitrator. *Gayley Mill Corp. v. Princeton Rayon Corp.*, 8 App. Div. 2d 814 (First Dept.).

NEW HAMPSHIRE SUPREME COURT HOLDS THAT CONTRACT CLAUSE TO THE EFFECT THAT THE ARBITRATION BOARD "MAY RENDER NO DECISION THAT CONFLICTS WITH OR EXCEEDS THE SCOPE OF THE AGREEMENT," DOES NOT MEAN THAT THE GENERAL TRANSPORTATION ARBITRATION BOARD CANNOT MAKE FINAL AND BINDING DECISIONS. The court said: "It seems reasonably clear that this proviso was not intended to deny the arbitration board power

to render final and binding decisions on simple questions of fact such as whether an employee quit his job or was physically unable to perform it. So far as we are aware it is not the practice of the courts to require a retrial of the facts which the arbitrators have already decided. To do so would destroy the value of grievance arbitration and would give the arbitration award the effect of a preliminary finding only rather than that of a final and binding decision which the arbitrators have already decided. To do so would destroy the value intended to establish an expert but informal tribunal for the resolution of questions of fact arising in the administration of the collective bargaining contract. Issues which were raised, or could have been raised, before the arbitration board are not to be retried in Superior Court." *Southwestern New Hampshire Transportation Co. v. Durham,* 32 LA 917 (New Hampshire Supreme Court, Kenison, Ch. J.).

NEW JERSEY COURT HOLDS THAT JOINT LOCAL COMMITTEE SET UP BY COLLECTIVE BARGAINING AGREEMENT IS VALID ARBITRATION BOARD AND THAT EMPLOYEE WHOSE SUSPENSION WAS ORDERED BY THE COMMITTEE CANNOT BRING SUIT AGAINST IT FOR DAMAGES FOR ALLEGED INTERFERENCE WITH HIS RIGHTS AS AN EMPLOYEE. The court said: "The Joint Local Committee was essentially an arbitration committee created by the . . . agreement of which plaintiff was one of the beneficiaries. To challenge its unanimous determination plaintiff would have to comply with the provisions of N.J.S. 2A:24-1 et seq. [the New Jersey Arbitration Statute]. Plaintiff elected not to follow the statutory proceeding. Instead he insists, ignoring the statute, he may sue the committee and its secretary for damages for alleged illegal performance of their duties under the agreement. He has no such right. It would be intolerable to countenance an action for damages against an arbitration committee . . . by an employee who was dissatisfied with the conclusions reached by such a committee in disposing of a matter lawfully committed to it for decision." *Kennedy v. McLean Trucking Co.,* 32 LA 323 (New Jersey Superior Court, Price, J.).

FACT THAT ARBITRATOR'S SON IS PARTNER IN LAW FIRM WHICH WAS PARTY TO DISPUTE ON RETIRING LAW PARTNER'S SHARE IN FEES, HELD NOT SUFFICIENT TO VACATE AWARD SINCE ALL PARTIES KNEW OF THE RELATIONSHIP AND AGREED ON THE ARBITRATOR, AND SINCE THERE WAS NO FRAUD OR MISCONDUCT ALLEGED. *Glatzer v. Diamond,* 187 N.Y.S. 2d 524 (Nathan, J.).

"THE DEMANDING AND RECEIVING OF FEES PRIOR TO THE COMPLETION OF THEIR DECISION BY ARBITRATORS WAS IMPROPER AND CONSTITUTED SUCH MISCONDUCT AS TO JUSTIFY THE COURT IN DENYING THE MOTION TO CONFIRM THEIR AWARD." *Katz v. Uvegi,* 187 N.Y.S. 2d 511 (Pette, J.).

N. Y. SUPREME COURT (SPECIAL TERM) HAS POWER TO APPOINT ARBITRATOR FOR PARTY TO FORESTALL FURTHER DELAYS IN THE ARBITRATION PROCEEDING. Pursuant to a court order compelling arbitration the party-appointed arbitrators were not to have any connection with the parties or their attorneys which would "disqualify a person from being a juror." After two years and two appointments by one party which failed to pass the juror test, the court said: "The qualifications of the arbitrators were prescribed in terms too clear to admit of mistake or misunderstanding. Yet, Princeton by designating successively two arbitrators, neither of whom met these qualifications, has completely frustrated the court's purpose. Since the facts constituting the disqualification were necessarily known to Princeton, its course cannot be regarded as other than a wilful obstruction of the arbitration. Two years have gone by and because of Princeton's two abortive designations the parties are today no nearer the determination of the controversy by the arbitrators than they were when the (order compelling arbitration) was entered. . . . If effect is to be given to the judgment, the court must itself now designate the arbitrator whom Princeton, despite full opportunity, has failed to designate." *Gayley Mill Corp. v. Princeton Rayon Corp.*, 185 N.Y.S. 2d 899 (Hofstadter, J.), aff'd (without opinion) 8 App. Div. 2d 696, 187 N.Y.S. 2d 326 (First Dept.).

MERELY MISCONSTRUCTING A DOCUMENT OR CONTRACT HELD NOT TO CONSTITUTE "PERVERSE MISCONSTRUCTION." Referring to that phrase in *Matter of Wilkins* (169 N.Y. 494), the Appellate Division, First Department said: ". . . the perverse misconstruction must be more than an egregious error of law before it satisfies the statute; it must be one which is so divorced from rationality that it can be accounted for only by one of the kinds of misbehavior recited in the statute. In that event, the vacatur is granted not for error of law or misconstruction of documents but for misconduct under one or more of the permitted categories, which misconduct has been established. Nothing like that was established in this case." *S & W Fine Foods, Inc. v. Office Employees Int'l Union, Local 153, AFL-CIO,* 185 N.Y.S. 2d 1021 (First Dept.).

IT WAS NOT IMPROPER FOR AN ARBITRATOR TO OBTAIN THE UNION'S OPINION CONCERNING A MATTER OF CONTRACT INTERPRETATION IN A CASE INITIATED BY NON-UNION EMPLOYEES. The grievants had contended that the employer's "work pick rules" represented a departure from former rules instituted under a collective bargaining agreement. The employer disputed this claim. Said the court: ". . . the arbitrator is the impartial arbitrator under the contract, and the procedure is more or less informal, and since the grievance claimed by petitioners might affect other employees of the Authority, represented by the Union designated by the employees, it was not improper to obtain the Union's opinion concerning the construction of the contract and the work pick rules." *Herman v. New York City Transit Authority,* 188 N.Y.S. 2d 282 (James S. Brown, J.).

ARBITRATOR HAD NO AUTHORITY TO AWARD EMPLOYEE DAMAGES FOR LOSS OF OVERTIME RESULTING FROM ASSIGNMENT OF WORK TO AN EMPLOYEE IN ANOTHER JOB CLASSIFICATION WHERE THE COLLECTIVE BARGAINING AGREEMENT PROVIDED FOR ARBITRATION OF "ONLY DIFFERENCES RELATING TO INTERPRETATION OR PERFORMANCE OF THIS AGREEMENT," AND WHICH CONTAINED NO JOB CLASSIFICATION LIST OR PENALTY PROVISION FOR MISASSIGNED OVERTIME. Said the court: "This is an over-all labor-management issue that involves, on the one hand, efficient plant management and economic production and, on the other, protection of an individual worker through union organization. The proper forum for settlement of the dispute is the bargaining table," affirming the Federal District Court's decision digested in *Arb. J.* 1950 p. 165. *Refinery Employees Union v. Continental Oil Co.*, 28 U. S. Law Week 2016 (C.A. 5th, June 25, 1959, Wisdom, J.).

ARBITRATORS "ARE NOT REQUIRED TO MAKE FINDINGS, OR GIVE REASONS FOR THEIR CONCLUSION, AND FAULTY REASONING, IF DISCLOSED, DOES NOT VITIATE" THEIR AWARD. *Application of Harris*, 337 P. 2d 832 (Cal. App. Second Dist., Ashburn, J.).

"THE FAILURE OF THE ARBITRATORS TO BE DULY SWORN AS REQUIRED BY LAW HAS BEEN HELD TO BE FATAL AND VOIDS THE ENTIRE PROCEEDINGS." *Katz v. Uvegi*, 187 N.Y.S. 2d 511 (Pette, J.).

V. ARBITRATION PROCEEDINGS

SELECTING AN ARBITRATOR AND PARTICIPATING IN THE HEARINGS ESTOPS A PARTY, UPON RECEIVING AN ADVERSE AWARD, FROM CONTENDING THAT THE MATTER WAS NOT ARBITRABLE. *National Cash Register Co. v. Wilson*, 7 App. Div. 2d 550, 184 N.Y.S. 2d 957 (Coon, J.).

HEARINGS ON SUNDAY GROUNDS FOR VOIDING AWARD. The court said: "Since arbitration is a judicial proceeding and arbitrators perform a judicial function, the arbitration proceedings and award herein were void upon the ground that hearings held on Sunday were in violation of Section 5 of the Judiciary Law." *Katz v. Uvegi*, 187 N.Y.S. 2d 511 (Pette, J.).

FAILURE TO DESIGNATE A GUARDIAN AD LITEM FOR THE CLAIMANT IN AN ACCIDENT CLAIMS ARBITRATION IS NOT NECESSARILY A FATAL ERROR, THE COURT HOLDING THAT SUCH DESIGNATION CAN BE MADE NUNC PRO TUNC IN AN ORDER DENYING A MOTION TO STAY ARBITRATION. *Exchange Mutual Insurance Co. v. Scandura*, 187 N.Y.S. 2d 103 (Saypol, J.).

OBJECTIONS TO A DEMAND FOR ARBITRATION ARE WAIVED BY PARTICIPATION OF BOTH PARTIES IN THE SELECTION OF ARBITRATORS. *Gray v. James Talcott, Inc.,* 188 N.Y.S 2d 256 (First Dept.).

PROCEDURAL MATTERS RELATING TO THE PROCESSING OF GRIEVANCES ARE QUESTIONS FOR THE ARBITRATOR TO DECIDE, HOLDS NEW HAMPSHIRE SUPREME COURT. *Southwestern New Hampshire Transportation Co. v. Durham,* 32 LA 917 (New Hampshire Supreme Court, Kenison, Ch. J.).

ARBITRATORS CANNOT BE REQUIRED TO VISIT PREMISES INVOLVED IN CONSTRUCTION DISPUTE, ALTHOUGH THEY PREVIOUSLY HAD AGREED THAT IT WOULD BE DESIRABLE TO DO SO. The court said: "Certainly a judge, sitting as a trier of the facts in a regularly constituted court, could not be *required* to make an inspection under the circumstances. . . . The rule can be no different in the case of an arbitrator or arbitrators." The court went on to state that "the proof here falls far short of a showing that the arbitrators' refusal was not within the very broad powers of discretion properly entrusted to arbitrators, or that it constituted misconduct and misbehavior within the meaning of section 1462 of the Civil Practice Act." *Colasante v. Bridgehampton Road Races Corp.,* 16 Misc. 2d 923, 185 N.Y.S. 2d 203 (Shapiro, J.).

VI. THE AWARD

AWARD DISCHARGING STOCKHOLDER FROM CORPORATE OFFICE ADMITTED AS EVIDENCE OF DEADLOCK AMONG DIRECTORS IN PROCEEDINGS TO DISSOLVE CORPORATION. *Application of Pivot Punch & Die Corp.,* 182 N.Y.S. 2d 459 (Jasen, J.).

NEW YORK COURT OF APPEALS AFFIRMS CONFIRMATION OF AWARD GRANTING SPECIFIC PERFORMANCE OF CONTRACT BY ORDERING APPELLANT TO RESTORE PETITIONER AS "MANAGER OF PRODUCTION AND ENGINEERING." The court said: "The contract provided that any controversy arising out of it should be settled by arbitration in accordance with American Arbitration Association Rules and the rules of that Association in so many words authorized an arbitrator to grant equitable relief including 'specific performance of a contract'." The court continued: ". . . we must remember that this corporation made a valid long term employment contract with this man and agreed that any disputes would go to arbitrators who would be empowered to order specific performance. Since the contract was indisputably valid, so is the arbitration award. The power of an arbitrator to order specific performance in an appropriate case has been recognized from early times." (Cp. decisions in this case digested in Arb. J. 1958 p. 57, and 1959 p. 45.) *Staklinski v. Pyramid Electric Co.,* 6 N.Y. 2d 159, 188 N.Y.S. 2d 541 (Desmond, J.).

COURT AFFIRMS AWARD ORDERING CONTRACTOR TO CONSTRUCT BUILDING IN ACCORDANCE WITH THE TERMS OF THE CONTRACT. The Appellate Division said: "It is urged by appellant that the award may not stand because equity will not lend its power to the enforcement of the kind of a decision in arbitration which it would neither allow nor enforce in an action maintained before it directly. Appellant's further contention, as to impossibility of compliance, was fully considered by the arbitrators. Arguments, similar to those urged by appellant, were advanced, and rejected, in *Staklinski v. Pyramid Co.*, 6 A.D. 2d 565. Moreover, under the modern trend, a court of equity will specifically enforce a building construction contract where the work to be done is sufficiently defined. In the instant case, the nature of the construction work to be done was clearly defined in the final plans and specifications which were approved by the parties. Since a court could have, in its discretion, directed specific performance the arbtrators did not exceed their powers in granting such relief." *Grayson-Robinson Stores, Inc. v. Iris Construction Corp.*, 7 A.D. 2d 367, 183 N.Y.S. 2d 695 (1st Dept.).

CLAIM THAT AWARD WAS NOT SIGNED OR ACKNOWLEDGED CAN BE RAISED UNDER THE PROCEDURE PROVIDED BY THE NEW JERSEY ARBITRATION STATUTE, NAMELY, IN AN ACTION TO VACATE AN AWARD. *Kennedy v. McLean Trucking Co.*, 32 LA 323 (New Jersey Superior Court, Price, J.).

NEW CLAIM FIRST PRESENTED ON MOTION TO MODIFY AWARD REQUIRES ARBITRATION DE NOVO RATHER THAN REMANDING TO SAME ARBITRATORS FOR RECONSIDERATION OF WHETHER AWARD SHOULD BE INCREASED BY SUM OF $1000, TO WHICH ONE PARTY CLAIMED TO BE ENTITLED. The Appellate Division said: "The Civil Practice Act (sec. 1462-a) gives the court the power to modify or correct an award where there has been an 'evident miscalculation of figures'. Quite obviously that was not the situation here, for the arbitrators were not even presented with any evidence as to the $1,090 item. . . . Hence, it seems appropriate that the entire controversy should be remanded for a new arbitration." *Eisenstein v. Rednick*, 8 App. Div. 2d 794, 187 N.Y.S. 2d 409 (First Dept.).

UNLESS THERE IS PROOF OF "FRAUD, OVERREACHING, MISBEHAVIOR OR SOME DISHONEST ACT ON THE PART OF THE ARBITRATOR," AN AWARD PURSUANT TO A CONSENT TO ARBITRATE WITHIN THE FRAMEWORK OF THE MUNICIPAL COURT CODE IS FINAL AND BINDING. *O'Connor v. Katz*, 186 N.Y.S. 2d 790 (Wahl, J.).

AWARD OF THE MASSACHUSETTS BOARD OF CONCILIATION AND ARBITRATION CANNOT BE SET ASIDE ON THE GROUND THAT THE BOARD ERRED ON QUESTIONS OF LAW AND FACT. *Kesslen Bros. v. Board of Conciliation*, 32 LA 859 (Mass. Supreme Judicial Court, Wilkins, Ch. J.).

AWARD WHICH FAILED TO STATE HOW MUCH BACK PAY WAS DUE TO EMPLOYEES ORDERED REINSTATED MAY NOT BE VACATED IN ENFORCEMENT PROCEEDING UNDER SEC. 301 TAFT-HARTLEY ACT BUT MAY BE REMANDED FOR COMPLETION OF THE ARBITRATION PROCESS. (See *Arb. J.* 1959 p. 48.) *Enterprise Wheel and Car Corp. v. United Steelworkers of America,* 28 U.S. Law Week 2005 (C.A. 4th, June 16, 1959, Soper, J.).

WHERE CLAIMS OF VIOLATIONS DURING A DEFINITE PERIOD OF A COLLECTIVE BARGAINING AGREEMENT WERE BEFORE THE ARBITRATOR, AN AWARD WHICH STATED THAT IT WAS ONLY A "PARTIAL AWARD WITHOUT PREJUDICE TO THE UNION PROCEEDING . . . AS TO VIOLATIONS . . . DURING THIS PERIOD OTHER THAN THOSE HEREIN PRESENTED" WAS VACATED FOR LACK OF FINALITY. The court said: "To be a final award upon the subject matter submitted, the award must dispose of all violations for the period involved and cannot leave the petitioner free to establish at a later time, additional violations for said period. The fact that failure to establish other violations may have been due to respondent's refusal to produce its books and records does not have the effect of permitting a partial award in violation of subdivision 4 of section 1462(CPA)." *Frank Rosenblum v. Burton Manufacturing Co.,* 15 Misc. 2d 445, 182 N.Y.S. 2d 641 (Conlon, J.).

AWARD ADJUDICATING CLAIMS OF SUBCONTRACTOR AND PRIME CONTRACTOR DOES NOT BAR PROCEEDING BY SUBCONTRACTOR AGAINST OTHER SUBCONTRACTOR FOR BALANCE DUE UNDER CONTRACT BETWEEN SUBCONTRACTOR AND THAT SUBCONTRACTOR, BECAUSE THE LATTER WAS NOT A PARTY TO THE ARBITRATION. *Geo. V. Nolte & Co. v. Pieler Construction Co.,* 337 P. 2d 710 (Sup. Ct., Washington, Ott, J.).

APPELLATE DIVISION CONFIRMS AWARD WHICH FOUND THAT MOTHER HAD BREACHED SEPARATION AGREEMENT BY COMMENCING ACTION FOR SUPPORT IN DOMESTIC RELATIONS COURT, reversing the Special Term (digested in *Arb. J.* 1959 p. 104). *Garnant v. Garnant,* 8 App. Div. 2d 814 (First Dept.).

"AN AWARD MADE UNDER A GENERAL SUBMISSION OF A CONTROVERSY BETWEEN THE PARTIES IS FINAL AND CONCLUSIVE AS TO MATTERS WITHIN THE SUBMISSION EVEN THOUGH NOT BROUGHT TO THE ATTENTION OF THE ARBITRATORS NOR EMBRACED IN THE AWARD." In so holding, the Appellate Division confirmed an award and reversed Special Term which had resubmitted the matter to arbitrators to give a building owner an opportunity to present his claim after a subcontractor filed a mechanic's lien. *Garnett v. Kassover,* 185 N.Y.S. 2d 435.

UNION HELD TO HAVE VIOLATED NO-STRIKE AND ARBITRATION PROVISIONS OF AGREEMENT BY INDUCING WORK STOPPAGE OVER COMPANY'S REFUSAL TO ASSIGN AN EXTRA MAN TO WORK ON A NEW PIECE OF EQUIPMENT. The court said: "Having determined that there existed between the parties an arbitrable dispute respecting the necessity or propriety of assigning a helper to the operation of the automatic electric welding machine, we now seek to determine which of the parties was responsible for the failure to arbitrate the question. The contract recognized that the company had the exclusive right to change equipment and to assign work to be performed, and to discharge employees for proper cause. Rouse was directed to operate the new welding machine without a helper. This, Rouse, by direction of the Union's business agent, refused to do. His refusal constituted proper cause for his discharge. If Rouse and his union considered the discharge without proper cause, the grievance and arbitration provisions of the contract were available for their invocation. Instead of abiding by these terms of the agreement, the Union called the strike, without affording the company any opportunity to request arbitration." *Structural Steel & Ornamental Iron Assoc. of New Jersey, Inc. v. Shopmen's Local Union No. 545 of the Int'l Assoc. of Bridge, Structural and Ornamental Iron Workers,* 172 F. Supp. 354 (D.C. N.J., Wortendyke, J.).

SEC. 301 OF TAFT-HARTLEY ACT GIVES FEDERAL DISTRICT COURT JURISDICTION TO ENFORCE AWARD DIRECTING EMPLOYER TO REIMBURSE EMPLOYEES FOR UNEMPLOYMENT BENEFITS WHICH HAD BEEN LOST BY REASON OF THE EMPLOYER'S CONTRACT VIOLATION IN DESIGNATING A TEMPORARY LAYOFF AS "VACATION WITHOUT PAY." *Textile Workers v. Cone Mills Corp.,* 28 U. S. Law Week 2005 (C.A. 4th, June 16, 1959, Soper, J.).

TEXAS SUPREME COURT VACATES AWARD WHICH FOUND THAT DISCHARGE WAS WITHOUT CAUSE AND WHICH REINSTATED EMPLOYEE TO A LOWER POSITION WITH BACK PAY HOLDING THAT DISCHARGE AND DISCIPLINE WERE NOT, AS THE LOWER COURT HELD, SEVERABLE SINCE THE ARBITRATORS HAD NO POWER UNDER THE CONTRACT TO DISCIPLINE EMPLOYEES AND THE DECISION TO REINSTATE WAS BASED UPON THE GRANTING OF SUCH INVALID DISCIPLINE. The lower court vacated the discipline but upheld the finding that the discharge was without just cause (*Arb. J.* 1959 p. 111). However, the Supreme Court found that the controlling vote in the arbitration for reinstatement had been cast on the theory that the discharged employee should be subject to discipline. Since the board had no power to discipline, the basis for the entire award was invalid. *Gulf Oil Corp. v. Guidry,* 32 LA 937 (Texas Supreme Court, Calvert, J.).